83-2076

No.

In the Supreme Court of the United States

October Term, 1983

ROGER POLLARD,
Petitioner,

vs.

BOARD OF POLICE COMMISSIONERS AND
NORMAN A. CARON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

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68pp

QUESTIONS PRESENTED FOR REVIEW

I. DOES R.S.MO. §84.830 (1978), WHICH PROHIBITS CONTRIBUTIONS FOR "ANY POLITICAL PURPOSE WHATEVER" BY KANSAS CITY POLICE OFFICERS, VIOLATE THE RIGHTS OF SUCH POLICE OFFICERS TO FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION?

II. DOES R.S.MO. §84.830 (1978), WHICH ONLY PROHIBITS POLITICAL CONTRIBUTIONS BY KANSAS CITY POLICE OFFICERS, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE ONLY KANSAS CITY POLICE OFFICERS ARE PROHIBITED FROM MAKING SUCH CONTRIBUTIONS WHILE NO POLICE OFFICERS IN OTHER MISSOURI CITIES ARE SUBJECT TO SUCH A STATUTORY PROHIBITION?

III. DOES THE FEDERAL ELECTION CAMPAIGN ACT, 2 U.S.C. §453, PREEMPT THE STATES FROM RESTRICTING CAMPAIGN CONTRIBUTIONS TO CANDIDATES FOR FEDERAL OFFICE?

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OPINIONS BELOW

The opinion of the Circuit Court of Jackson County, Missouri is not officially reported. It is, however, set forth in Appendix B to this Petition. The opinion of the Missouri Supreme Court is reported at 665 S.W.2d 333, and is set forth in Appendix A to this Petition.

JURISDICTION

The judgment of the Circuit Court of Jackson County, Missouri was filed on October 28, 1982. Respondents herein timely filed their notice of appeal, appealing the judgment of the Circuit Court to the Missouri Supreme Court. The opinion of the Missouri Supreme Court reversing the judgment of the Circuit Court was filed on February 15, 1984. Thereafter, a timely motion for rehearing was filed by Petitioner herein, which motion was overruled on March 20, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

This case involves: R.S.Mo. §84.830 (1978); 2 U.S.C. §453; and the First and Fourteenth Amendments to the United States Constitution. The pertinent provisions of these statutes are set forth in full in Appendix C.

STATEMENT OF THE CASE

Petitioner, Roger Pollard, was a sergeant on the Kansas City Police Department. On July 5, 1982, he voluntarily contributed $1,000 out of his own funds to the Carnes for Congress Committee, a committee formed to promote the candidacy of John Carnes, a member of the Independence, Missouri city council seeking the Democratic nomination for United States Representative from Missouri's Fifth District. (The Fifth District includes most of Kansas City and part of Independence, Missouri.)

Sergeant Pollard's contribution was not solicited by or paid to any other member of the Police Department nor was it made on public premises or while he was in uniform. There was no evidence that Sergeant Pollard ever engaged in any corrupt acts or was anything other than an exemplary police officer.

In accordance with the provisions of the Federal Election Campaign Act, 2 U.S.C. §§431-455, the Carnes for Congress Committee filed a report with the Missouri Secretary of State under the provisions of R.S.Mo. §130.086 (1978). News of the contribution was published in the July 26, 1982 edition of the Kansas City *Star* and the July 27, 1982 edition of the Kansas City *Times*. Those articles identified Sergeant Pollard by name, stated the amount of his contribution, and identified him as a Kansas City police officer.

As a result of these newspaper articles, Sergeant Pollard's contribution came to the attention of Norman

Caron, Kansas City Chief of Police. On August 4, 1982, pursuant to R.S.Mo. §§84.600 and 84.610 (1978), Sergeant Pollard was charged with violating R.S.Mo. §84.830.1 (1978), which prohibits contributions to political parties, political clubs or for any political purpose. Sergeant Pollard was not accused of any wrongdoing other than making a contribution.

A public hearing concerning that charge was held on Tuesday, August 17, 1982 before the Kansas City Board of Police Commissioners, the governing body of the Kansas City Police Department. The Board ordered that Sergeant Pollard be terminated as a police officer.

On August 2, 1982, Petitioner filed suit with the Circuit Court of Jackson County, Missouri, seeking declaratory and injunctive relief under 42 U.S.C. §1983. In his Petition with that Court, Sergeant Pollard alleged that: (1) §84.830 could not be enforced in a federal election because the field was preempted by the Federal Election Campaign Act, 2 U.S.C. §453; (2) §84.830 violated his First Amendment rights; and (3) §84.830 deprived him of equal protection of the laws under the Fourteenth Amendment. Defendants in that suit were Chief Caron and the Board.

On August 16, 1982, and September 30, 1982, the trial court heard evidence in this cause. Sergeant Pollard testified that he was unaware of the existence of §84.830 when he made his contribution.

Respondents presented various witnesses who described the history of the Kansas City Police Department from 1875 to the present. A great deal of testimony described the sordid "Pendergast era" (named for a political boss of the 1930's) when corruption in the Police Department was rampant. These witnesses decried the pernicious effect of politicization of the Police Department and the

infamous "cut and lug" system in which police officers were compelled to make political contributions in order to retain their employment.

On October 28, 1982, Judge William F. Mauer of the Jackson County Circuit Court entered a Memorandum Opinion and Order in which the Court ordered Sergeant Pollard reinstated with back pay. The Court based its order on a holding that 2 U.S.C. §453 preempted Missouri from prohibiting contributions to candidates for federal office. It alternatively held that the First Amendment prohibited a total ban on voluntary political contributions. It did not rule on Petitioner's equal protection claim.

On appeal a divided Missouri Supreme Court reversed the Circuit Court on February 15, 1984. It ruled that Congress did not intend to preempt laws like §84.830 in enacting the Federal Election Campaign Act. It further ruled that §84.830 was a justifiable restriction of Sergeant Pollard's First Amendment rights. The Court perfunctorily denied Petitioner's equal protection claim since the trial court had not relied on that ground. The Court denied rehearing on March 20, 1984.

Another Kansas City police officer, Sergeant Mark Reeder, was also charged with violating §84.830. Sergeant Reeder filed suit in the United States District Court for the Western District of Missouri. Judge Scott O. Wright of that Court enjoined the Board from discharging Sergeant Reeder based on reasoning quite similar to that of Judge Mauer. On May 3, 1984, the Eighth Circuit Court of Appeals reversed the District Court but remanded the case for an evidentiary hearing on Sergeant Reeder's equal protection claim, *Reeder v. Kansas City Board of Police Commissioners,* ..... F.2d ....., 8th Cir. Case No. 83-1353-WM. On May 31, 1984, the Eighth Circuit denied Sergeant Reeder's Petition for Rehearing in Banc by an equally divided vote.

REASONS FOR GRANTING THE WRIT

I.

The Missouri Supreme Court ruled that §84.830 does not impermissibly infringe on Petitioner's First Amendment Rights. Before turning directly to the Court's reasoning, Petitioner would note certain principles in overview.

It is axiomatic that the freedoms embodied in the First Amendment occupy the very apex of our hierarchy of constitutional values. The protections of that amendment reflect a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

One of the rights guaranteed by the First Amendment is "the freedom to associate with others for the common advancement of political beliefs and ideas. . . ." *N.A.A.C.P. v. Button*, 371 U.S. 415, 450 (1963). In this connection the guarantees of the First Amendment have their "fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-272 (1971). Consequently, this Court has held that the right to make political contributions rests at the very core of the First Amendment's protection of both freedom of speech and freedom of association, *Buckley v. Valeo*, 424 U.S. 1, 15-20, 24-25 (1976). It follows, then, that limits on the right to make such contributions restrict core First Amendment freedoms, *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977).

Of course, even First Amendment rights are not absolute, and limitations thereon will be upheld *if* a sufficient showing is made to pass constitutional muster.

However, given the favored position occupied by the First Amendment, regulation of such rights is always subject to "exacting judicial review." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981).

In exercising such scrutiny, a statute infringing on First Amendment rights is presumed to be unconstitutional, and its proponent bears the burden of establishing the statute's constitutionality, *Harris v. McRae*, 448 U.S. 297, 312 (1980). Where the State seeks to meet this burden, it must show the existence of two conditions. First, the State must demonstrate that it has an interest in restricting First Amendment rights that is "paramount, one of vital importance. . . ." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Second, even if the State has a sufficiently important interest to justify some restrictions on speech, "the State must employ means closely drawn to avoid unnecessary abridgment." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

The second of these conditions has generated considerable case law. It has been repeatedly held that laws restricting the exercise of First Amendment rights cannot be sustained even if they are in fact helpful in achieving vital governmental interests, *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 222 (1967), unless the means selected by the State are essential or necessary to achieve the governmental purpose, *Shelton v. Tucker*, 364 U.S. 479, 489 (1960); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The State may not choose means that unnecessarily restrict constitutionally protected liberty, *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973). Rather, the State bears the burden to establish that its "interests could not be met by restrictions that are less intrusive on protected forms of expression." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74 (1981). The statute must be the

least restrictive means available that would accomplish the State's purpose, *Elrod v. Burns,* supra, 427 U.S., at 363.

Moreover, it is not sufficient that the means chosen by the State in furtherance of its interest are rationally related to that end, *Elrod v. Burns,* supra, 427 U.S., at 362. There must be a "substantially relevant correlation between the governmental interest asserted and the State's effort to prohibit appellants from speaking." *First National Bank of Boston,* supra, 435 U.S., at 795.

The Missouri Supreme Court very candidly conceded that §84.830 entails restrictions on substantial First Amendment rights, 665 S.W.2d, at 339. Moreover, it recognized that Missouri had to have a "compelling government interest" to uphold such restrictions, 665 S.W.2d, at 341, and that the means employed had to be "the least restrictive appropriate to the task." 665 S.W.2d, at 340.

In this connection the Missouri Supreme Court noted three vital State interests which it claimed were advanced by §84.830:

1) Assuring that police officers will not be compelled to make political contributions in order to retain their employment;

2) Guaranteeing that police officers will impartially enforce the law, without regard to the political affiliation of the citizens with whom they deal; and

3) Preventing ranking police officers from becoming political power brokers by extorting contributions from their subordinates, 665 S.W.2d, at 336.

Petitioner has never denied that these are salutary goals and justify restrictions on police officers not applicable to the public at large. It does not follow, however, that because §84.830 has noble purposes, any and all

means may be employed in their pursuit. Petitioner believes the key issue at bar is whether the Respondents have met their burden to show that the aforementioned interests could not be achieved by restrictions that are less intrusive on protected forms of expression.

When examined in light of the foregoing, it is manifest that the ban on all contributions in §84.830 fails to pass constitutional muster. As to the first and third of the interests noted above—assuring that contributions are not a condition of employment and preventing senior police officers from using extorted contributions to become power brokers—they are directly addressed by other sections of §84.830 which prohibit the solicitation of funds from police officers and which prohibit promotion and retention of employment from being conditioned on making political contributions. These prohibitions are far less intrusive than a total ban on voluntary contributions.

As to the second interest noted by the Missouri Supreme Court—assuring that police officers enforce the law impartially—the Court fails to explain why a ban on political contributions is essential to achieving this interest. In fact §84.830 is both overinclusive and underinclusive in that regard. It is overinclusive in that there is no reason to believe that police officers who are free to make voluntary contributions will be more likely to enforce the laws on a partisan basis. It is underinclusive in that §84.830.2 expressly provides that Kansas City police officers retain the right to "vote as they may choose and to express their opinions on all political subjects and candidates." If Kansas City police officers can express opinions about candidates for office, is it less likely that they will enforce the law on a partisan basis than if they also have the right to make voluntary contributions to those same candidates whom they support? Petitioner would suggest it is not.

Moreover, even if there is some basis for limiting the right to make some political contributions, it does not follow that an outright ban on *all* contributions is constitutionally permissible as the present case illustrates. Petitioner made a campaign contribution to John Carnes, an *Independence* city council member running for the United States Congress. Petitioner's career as a Kansas City police officer in no way depended upon that candidate, nor could it be advanced by Carnes' election. The possibility that prohibiting contributions to Carnes' campaign would serve to attract qualified persons to the police department by guaranteeing freedom from political pressure is nonexistent—members of the Kansas City Police Department are not going to be hired or fired because John Carnes is, or is not, elected to the United States House of Representatives. It is patently ludicrous to claim that §84.830 bears a substantially relevant correlation to a compelling State interest—at least as it is applied at bar.

The Missouri Supreme Court answered this argument by noting that political parties operate on national and local levels and that, "A contribution to a congressional candidate well *might* benefit the local politicians who have made common cause with the candidate." (Emphasis added.) 665 S.W.2d, at 340. In other words the Missouri Supreme Court held that a ban on all contributions is justified because there is a *possibility* that a candidate for national office *might* help a local politician who (presumably) *might* corrupt the police officer who made the contribution.[1]

If it were that easy for the State to meet its burden to demonstrate the constitutionality of a statute, then the

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1. Applying this reasoning, if Petitioner "checked off" on his federal income tax return, and President Reagan or Vice President Mondale received some benefit, the Kansas City Police Department would be riddled with corruption.

"least restrictive means" test would be reduced to hollow words without force or effect. In order to satisfy the exacting scrutiny of the First Amendment it is not sufficient that there be "a very distant possibility of harm," *United Mine Workers*, supra, 389 U.S., at 223. To describe the Missouri Supreme Court's concern as a very distant possibility of harm would be charitable.

The insubstantiality of the Missouri Supreme Court's reasoning is best illustrated by *United States v. Robel*, 389 U.S. 258 (1967). In that case Robel, a shipyard worker and a member of the Communist Party, was indicted for violating the Subversive Activities Control Act which made it unlawful for members of Communist-action organizations (i.e. those controlled by foreign communist governments) to work in defense facilities. Robel claimed the statute violated his First Amendment right to freedom of association. The government claimed that it had a substantial interest in preserving the national security by guarding against internal subversion of defense plants.

This Court acknowledged the compelling nature of the government's interest but not the efficacy of its means. Chief Justice Warren noted that membership in the Communist party, by itself, was insufficient to impute to Robel the organization's illegal goals. The Court also noted that Congress could permissibly punish persons who engage in espionage and deny access to secrets to persons who would use such information to harm the nation, 389 U.S., at 267. The vice of the Subversive Activities Control Act was that it punished persons who did not engage in such acts as well as those who did. In striking down the statute, the Court noted:

> Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected

> First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms.

389 U.S., at 267-268.

The teaching of *Robel* is very clear at bar. Just as the government may punish those who engage in acts of espionage, certainly Missouri may punish those persons who try to extort political contributions from police officers or those officers who try to purchase promotions. (In fact §84.830 already does that.) It does not follow, however, that all police officers may be prohibited from making political contributions because of the danger that some of those officers may engage in acts of venality, any more than all communists may be barred from defense facilities because some communists may engage in acts of espionage.

The failure of the Missouri Supreme Court to advance any cogent reasons for the necessity of prohibiting all volunitary political contributions is not the result of oversight by that Court. Rather, it reflects the fact that Respondents were completely unable to adequately suggest why the total ban in §84.830 is a necessary condition for achieving its goals.

Moreover, such a suggestion would fly in the face of practical experience. Police officers in Kansas City are the only police officers in the State of Missouri who are prohibited by State statute from making political campaign contributions. No such ban applies to St. Louis police officers[2] or members of the Missouri Highway Pa-

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2. In fact the St. Louis Police Department explicitly permits its police officers to make political campaign contributions, *Reeder v. Kansas City Board of Police Commissioners*, ... F.2d ....., Slip Opinion at 9, 8th Cir. Case No. 83-1353-WM (May 3, 1984).

trol. Indeed, there is no comparable ban on contributions by members of the Federal Bureau of Investigation. 28 C.F.R. §45.735-19(a). If an outright ban on voluntary contributions was essential to achieving incorruptible law enforcement agencies, one would expect the absence of such a ban in the aforementioned agencies to result in widespread corruption. That such is not the case can hardly be gainsaid.

The Missouri Supreme Court makes one other point that should be addressed. It indicates that when police officers put on their uniforms, they necessarily surrender certain rights enjoyed by the citizenry at large.[3] The erosion of the "right-privilege" doctrine is one of the hallmarks of First Amendment law.[4] It is now clear that, "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Abood*, supra, 431 U.S., at 234. "[P]olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). The only time the State can condition employment on the relinquishment of First Amendment rights is where it meets its burden of showing that the relinquishment satisfies constitutional minima, *Elrod v. Burns*, supra, 427 U.S., at 363.

Petitioner would respectfully submit that the opinion of the Missouri Supreme Court contravenes the general principles of law outlined above. No decision of this Court

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3. The Missouri Supreme Court made this point by quoting Justice Holmes' famous statement that, "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892), cited at 665 S.W.2d, at 339.

4. *McAuliffe* has long been repudiated by this Court, *see*: *Connick v. Myers*, ... U.S. ....., 75 L.Ed.2d 708, 717-718 (1983).

has directly decided the authority of a public employer to totally ban all voluntary political contributions by its employees. No such ban was involved in *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973), because in that case the regulations promulgated under the Hatch Act expressly permitted voluntary political contributions, 413 U.S., at 576 n. 21. Nor was such a ban involved in *Ex parte Curtis,* 106 U.S. 371 (1882), where the statute prohibited federal employees from giving money to other government employees but did not prohibit voluntary contributions to persons who were not federal employees, 106 U.S., at 373. Petitioner would submit that the present cause raises a sufficiently compelling question of federal law to warrant granting his Petition.

II.

The Missouri Supreme Court summarily denied Petitioner's Fourteenth Amendment equal protection claim, 665 S.W.2d, at 342. Petitioner would submit this was error.

Where a statutory classification does not invidiously discriminate against a suspect class or trammel fundamental personal rights, the appropriate standard of judicial review is the traditional rationality test, *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). Where, however, a statutory classification burdens the exercise of First Amendment rights, "the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized," *Carey v. Brown,* 447 U.S. 455, 461-462 (1980). In such cases it is not sufficient that the classification is rationally related to a legitimate State interest; the differential treatment must be "*necessary* to the achievement of a *com-*

pelling state interest," (emphasis in original) *San Antonio School District v. Rodriguez*, 411 U.S. 1, 34 n. 73 (1973).[5]

Petitioner has previously established that First Amendment rights are among the most fundamental of the personal rights and liberties guaranteed by the Constitution. Petitioner has also established that the right to make a political contribution rests at the core of First Amendment freedoms. It should logically follow that this Court must subject §84.830 to strict scrutiny.

The discriminatory effect of §84.830 is obvious: of all police officers in the State of Missouri, only those in Kansas City are deprived of the right to make political contributions by Missouri statute. Assuming, *arguendo*, that there is some compelling interest justifying a prohibition of contributions by law enforcement personnel to candidates for national office, Respondents surely cannot advance any substantial governmental interest which would be served by only regulating such contributions by Kansas City police officers. The Missouri General Assembly has not placed identical restrictions on St. Louis police officers, R.S.Mo. §§84.010-84.340 (1978), members of the State Highway Patrol, R.S.Mo. §43.060 (1978), or police officers in any other cities in Missouri.[6]

Unless Respondents can demonstrate a compelling reason for the State of Missouri to prohibit Kansas City police officers from making political contributions while

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5. It is important to distinguish the difference between Petitioner's First Amendment argument, supra, and his equal protection claim. It is conceivable that a statute which restricts speech may nonetheless be permissible if it survives the exacting scrutiny noted above. However, where such a statute only burdens the speech of certain groups, then it must survive an additional test of strict scrutiny to justify the differential treatment.

6. R.S.Mo. Chapter 85 (1978), governs police officers in cities other than St. Louis and Kansas City. It contains no provision comparable to §84.830.

not similarly prohibiting such contributions by other police officers, it logically follows that §84.830 is underinclusive and deprives Petitioner of equal protection of the law. Thus, even if the Court finds that §84.830 passes First Amendment muster under the criteria articulated, supra, the statute must still be struck down on equal protection grounds.

III.

The Federal Election Campaign Act, 2 U.S.C. §§431-455 (hereafter "F.E.C.A."), provides a comprehensive regulatory scheme for the conduct of campaigns for federal office and "includes restrictions on political contributions and expenditures that apply broadly to all phases of and all participants in the [federal] election process." *Buckley v. Valeo*, supra, 424 U.S., at 12-13. Originally enacted in 1971, the act was extensively amended in 1974 by Public Law 93-443. One of the amendments effected in 1974 was the present form of 2 U.S.C. §453 which provides as follows:

> The provisions of this Act, and rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

The Jackson County Circuit Court held that this language precluded Missouri from prohibiting contributions to candidates for *federal* office since the F.E.C.A. provided comprehensive regulation of such contributions. The Missouri Supreme Court reversed on the ground that Congress did not intend the 1974 amendments to the F.E.C.A. to limit the right of the States to regulate political activities by their employees in federal elections.

Petitioner would submit the Missouri Supreme Court erred in doing this for two reasons.

First, the Missouri Supreme Court erred by looking beyond the plain language of the statute and by trying to determine the intent of Congress in enacting the 1974 amendments. Where a statute unambiguously and explicitly (rather than implicity) preempts State law, it is not appropriate to look beyond the statutory language in determining the fact of preemption, *Aloha Airlines, Inc. v. Director of Taxation*, ... U.S. ....., 78 L.Ed.2d 10, 15 n. 5 (1983). Since 2 U.S.C. §453 unambiguously preempts "any provision of State law with respect to election to Federal office," the Missouri Supreme Court erred in its attempt to interpret the intent of Congress.

Even assuming, *arguendo*, that the Missouri Supreme Court did not err by looking beyond the plain language of 2 U.S.C. §453, it erred in the conclusions it drew as to the intent of Congress. Specifically, the Court looked at the wrong legislative history in determining what Congress intended in enacting this section.

When Congress enacted Public Law 93-443, it amended, *inter alia*, Titles 2 (which includes the F.E.C.A.), 5, 18, 26, and 47. The portion of Title 5 amended was §1502 regulating the political activities of State or local employees whose salaries are funded by federal grants. Prior to 1974, 5 U.S.C. §1502(a)(3) prohibited such employees from taking "an active part in political management or in political campaigns." In 1974 this language was narrowed by a provision that a State or local employee may not "be a candidate for elective office." Nothing in 5 U.S.C. §1502, before or after 1974, preempted State law governing State employees. Nothing in the amendment purported to limit the right of the States to place more severe restrictions on their employees' political activities than appears in § 1502(a).

Undoubtedly, the drafters of the 1974 amendment were concerned that there be no *implied* preemption of the rights of the States by 5 U.S.C. §1502. In that context the various committee reports and the colloquy between Senators Stevens and Cannon (cited at 665 S.W.2d, at 337-338) make sense. They explicitly refer to the lack of any preemptive effect of 5 U.S.C. §1502.

That legislative history is of no value, however, in construing 2 U.S.C. §453, the section at issue in this case. Unlike 5 U.S.C. §1502, 2 U.S.C. §453 *expressly* preempts State law. There is *no* legislative history for 2 U.S.C. §453 comparable to that for 5 U.S.C. §1502 cited by the Missouri Supreme Court. Indeed, the House Committee Report noted as follows:

> The committee bill contains two separate provisions relating to the preemption of State laws. One is contained in title III of the bill and amends section 403 of the Federal Election Campaign Act of 1971 [2 U.S.C. §453] to provide that the provisions of that Act, as amended by this legislaiton, [sic.] supersede and preempt any provision of State law with respect to election to Federal office. *It is the intent of the committee to make certain the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated.*
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> • • •
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> The other preemption provision was added to title I of the bill, relating to amendments to the criminal code. This was done to make it clear that the Federal law is intended to be the sole source of criminal sanctions for offenses involving political activities in connection with Federal elections.

(Emphasis added.) H.R.Rep.No. 1239, 93rd Cong., 2d Sess. 10, reprinted in F.E.C., *The Legislative History of the 1974 Amendments to the Federal Election Campaign Act*, at 644. Hence, Congress was quite explicit about its intent to occupy the field with respect to federal elections.

The Missouri Supreme Court sloughs off the obvious inapplicability of the legislative history it cites by noting that Public Law 93-443 amended a number of different titles and that, "It is highly unlikely that the debaters mentally sorted the several provisions of the bill before them according to title." 665 S.W.2d, at 338.

Petitioner would submit this analysis makes no sense. As was noted earlier, 5 U.S.C. §1502 has *no* preemption provision; 2 U.S.C. §453 is an express preemption provision. Holding that Congress' intent regarding the preemptive effect of 2 U.S.C. §453 can be discerned by reading the history of a section that has *no* preemption language (i.e. 5 U.S.C. §1502) is simply absurd. Moreover, the debaters cited by the lower Court were all quite careful in referring specifically to Title 5. There is simply no reason to assume these persons meant Title 2 when they said Title 5.

There have been no cases construing 2 U.S.C. §453 and the rights of the States thereunder. Obviously this case will have important ramifications beyond this cause and warrants certiorari.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Roger POLLARD, Respondent,

v.

BOARD OF POLICE COMMISSIONERS, et al., Appellants.

(Two cases)
Nos. 64637, 65300.

Supreme Court of Missouri,
En Banc.

Feb. 15, 1984.

Rehearing Denied March 20, 1984.

* * *

J. Emmett Logan, Karl F. Schmidt, Manfred Maier, Kansas City, for appellants.

Gerald H. Rosen, Richard H. Anton, Kansas City, for respondent.

BLACKMAR, Judge.

The respondent, Roger Pollard, was a sergeant in the Kansas City, Missouri Police Department. On July 5, 1982 he contributed $1,000, out of his own ample funds, to a political committee formed to promote the candidacy of John Carnes for nomination in a party primary for Representative in Congress from Missouri's Fifth District. Pollard's contribution was not solicited by or paid to a member of the Police Department, and was not made on

public premises or while he was in uniform. The contribution was reported to the Missouri Secretary of State as required by law[1] and was the subject of newspaper comment.

When news of Pollard's contribution came to the attention of his superiors in the police department, steps were taken to terminate his employment pursuant to the following portions of § 84.830, RSMo 1978.

> 1. * * * No officer or employee in the service of said police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatever.
>
> 7. Any officer or any employee of the police department of such cities who shall be found by the board to have violated any of the provisions of this section shall be discharged forthwith from said service. It shall be the duty of the chief of police to prefer charges against any such offending person at once. . . .

Pollard filed suit under 42 U.S.C. § 1983 seeking an injunction against his termination, and also declaratory relief, claiming (i) that § 84.830 could not be enforced with regard to federal campaigns because the field had been preempted by certain federal legislation, (ii) that prohibition of political contributions by police officers violated his first amendment rights, and (iii) that § 84.830 deprived persons in his position of the equal protection of the laws.

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1. Section 130.086, RSMo 1978, provides that a candidate for elective federal office shall be deemed to have fully complied with Missouri's Campaign Finance Disclosure Laws (Chapter 130, RSMo 1978) if he files copies of all elective reports required by federal law with the Missouri Secretary of State.

The appellant Board of Police Commissioners introduced substantial evidence about the circumstances leading to the adoption of the statute under challenge. In 1932 this Court held that the existing statutes providing for state control of the Kansas City Police Department were unconstitutional. *State ex rel. Field v. Smith,* 329 Mo. 1019, 49 S.W.2d 74 (banc 1932). After control reverted to the city the police department became heavily politicized. Policemen who belonged to the party out of power were discharged. Those who remained, and those newly hired, were obliged to profess adherence to and to contribute a portion of their salaries to the support of the dominant political party. There followed substantial discoveries of corruption touching not only the police department but the entire governmental structure of Kansas City and Jackson County.[2]

The predecessor of § 84.830 was enacted in 1939 as a part of the act returning the Kansas City Police Department to state control by placing it under the direction of a board consisting of the mayor and four commissioners appointed by the governor. Laws of Missouri, 1939 p. 545. The statute was enlarged in 1943, when the provision now before us was added.[3] The evidence showed that compulsory political contributions from public employees (known

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2. *See* State ex inf. *Taylor v. American Insurance Co.,* 355 Mo. 1053, 200 S.W.2d 1 (banc 1946); State ex inf. *McKittrick v. Graves,* 346 Mo. 990, 144 S.W.2d 91 (banc 1940); State ex inf. *McKitrick v. Williams,* 346 Mo. 1003, 144 S.W.2d 98 (banc 1940); and *United States v. Pendergast,* 28 F.Supp. 601 (W.D.Mo.1939) for a discussion of the then existing political conditions in the Kansas City and Jackson County governmental structures.

3. Laws of Mo.1943, p. 727.

Only a portion of § 84.830, RSMo 1978 is material to this case. The statute prohibits a variety of activities, including solicitation of contributions by and from police officers, solicitation on police premise, retaliation against those who fail to contribute, and other restrictions designed to insulate the police department from political influence.

colloquially as "the lug")[4] were important to a scheme of political control.

The appellants sought to demonstrate by evidence and argument that the challenged portion of the statute was designed to protect police officers and the public from political impaction of the law enforcement machinery. The law seeks to assure persons aspiring to careers in law enforcement that they are not obliged to make public display of political affiliation or defer to the wishes of political dignitaries in order to guarantee retention and promotion, and that they may have the full benefit of their often meager compensation undiminished by the lug. The statute additionally serves to proclaim that police protection will be available to the public, free from political overtones, and that the police will deal impartially with all who give them concern. The legislature may have had the further thought that ranking police officers might function as political power brokers if they could freely induce contributions from their subordinates. All of these reasons are matters of substantial state interest and concern. We of course are not concerned with the wisdom of the legislation, and the factual background is appropriate only to demonstrate the considerations which might have influenced the legislature.

The trial judge, although recognizing that there is "a vital state interest in eliminating corruption from the police department, in eliminating political interference," nevertheless held that the area had been preempted by federal legislation, insofar as federal elections are involved, and that the statute deprived Pollard of first amendment rights. Reinstatement with back pay was ordered along with at-

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4. *Lug*, "[M]oney exacted by politicians . . ." *Dictionary of American Slang*, (Crowell, 1967). The winged steeds guarding the south entrance to Kansas City's imposing City Hall, completed in 1937, were popularly christened "Cut" and "Lug" as soon as they were set in concrete.

torneys' fees pursuant to 42 U.S.C. § 1988. The judge analyzed the issues and stated his conclusions in a thoughtful memorandum opinion, which we have considered carefully. We nevertheless disagree with his conclusions and reverse the judgments.[5]

I. Preemption

The trial court found preemption in the wording of 2 U.S.C. § 453, reading as follows:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

2 U.S.C. § 453 assumed its present form in 1974, as a part of a bill amending a 1971 enactment known as the "Federal Election Campaign Act of 1971."[6]

The 1971 statute expressed a purpose as follows:

> To promote fair practices in the conduct of election campaigns for Federal political offices . . .

The statute contained four titles, covering subject matter as follows: (1) campaign communications, treating of relations between political campaigns and the media; (2) amendments to the Criminal Code, Title 18, U.S.C.; (3) disclosure of federal campaign funds; and (4) "General Provisions," including in Section 403, then codified as 2 U.S.C. § 453, a disclaimer of federal preemption. None of the provisions had the least relationship to the protection of the public service from political influences.

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5. The writer has made use of research and sometimes of phraseology employed by Judge Billings in an opinion circulated at an earlier stage.

6. Pub.L. No. 92-225, 86 Stat. 3-20 (codified at 2 U.S.C. §§ 431-54 (Supp. II 1972)).

The purpose of the 1974 federal statute[7] is expressed as follows:

> To impose overall limitations on campaign expenditures and political contributions; to provide that each candidate for Federal office shall designate a principal campaign committee; to provide for a single reporting responsibility with respect to receipts and expenditures by certain political committees; to change the times for the filing of reports regarding campaign expenditures and political contributions; to provide for public financing of Presidential nominating conventions and Presidential primary elections; and for other purposes.

Only Titles 2 and 3 of the 1974 statute are amendatory of the 1971 statute. The 1974 act amends the corresponding section of the 1971 act to provide for express preemption, in the language set out above.

Even if a reader of the bare language might have some question as to the scope of the express preemption, the legislative history shows clearly that Congress did *not* intend the preemption language of § 453 to annul state little Hatch Acts, and other state laws, such as § 84.830, having similar incidence and purpose. The overwhelming concern was revision of the Federal Election Campaign Act of 1971. The legislative history makes it clear that 2 U.S.C. § 453 was intended only to preempt the limited field of statutes imposing restrictions on candidates for federal office and their campaign committees. The Conference Committee explained that purpose of § 453, as follows:

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7. Pub.L. No. 93-443, 88 Stat. 1263-1304 (codified as amended at 2 U.S.C. §§ 431-55 (1976)).

> It is clear that the Federal Law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, *but does not affect State laws as to the manner of qualifying as a candidate, or the dates and places of elections.*

S.Conf.Rep. No. 1237, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad. News 5587, 5618, 5668 (emphasis added).

The Conference Committee also noted that the inclusion of amendments to the federal Hatch Act in the 1974 amendatory act was not an expression of a desire to preempt state laws in that field of concern. The report stated:

> It is the intent of the conferees that any State law regulating the political activities of State and local officers and employees is *not preempted or superseded* by the amendments to title 5, United States Code, made by this legislation.

Id. at 5669 (emphasis added). Similarly, the House Report states that "[t]he regulation of political activities of State and local employees would be left largely to the States." H.Rep. No. 1239 93rd Cong., 2d Sess. 11, *reprinted in* FEC, *The Legislative History of the 1974 Amendments to the Federal Election Campaign Act*, at 1092.

An examination of the Senate debate on the 1974 amendatory act further emphasizes that, by including amendments to the federal Hatch Act in the bill, the legislature did not intend to preempt state laws regulating the political activities of state and local employees in federal elections. The following exchange between Senator Stevens and Senator Cannon, the floor manager of the bill, exemplifies this point:

MR. STEVENS: Mr. President, just 1 minute. I should like to clarify something, if I may, with the manager of the bill.

A provision of this bill amends section 1502 of title 5 relating to the activity of State or local employees in Federal campaigns. Specifically, it takes out subsection (a)(3), which prohibits a State or local officer or employee from taking an active part in political management or political campaigns, and substitutes for that a prohibition from being a candidate for Federal office.

It is my understanding, and I should like to ask the manager of the bill, my friend from Nevada (Mr. Cannon), if he agrees that this means *that State laws which prohibit a State employee, or local laws which prohibit a local employee, from engaging in Federal campaign activities and Federal campaigns are still valid? . . .*

I think it is quite important, because *many of our States have the so-called little Hatch Act, and it was not our intent to repeal those "little Hatch Acts," or to modify them, but to take it out of the Federal law so that Federal law does not prohibit those activities leaving it up to the State to do so.*

MR. CANNON: The Senator is *absolutely correct.* Section 401 of the House amendment amended section 1502 of title 5, U.S.Code, relating to influencing elections, taking part in political campaigns, prohibitions, and exceptions, to provide that State and local officers and employees may take an active part in political management and in political campaigns, except that they may not be candidates for elective office.

> The conference substitute is the same as the House amendment. *It was the intent of the conferees that any State law regulating the political activity of State or local officers or employees is not preempted,* but superseded [sic].[8] We did want to make it clear that if a State has not prohibited those kinds of activities, it would be permissible in Federal elections. . . .
>
> MR. STEVENS: *It is up to the State to determine the extent to which they (public employees) may participate in Federal elections?*
>
> MR. CANNON: *The Senator is right. The States make that determination.*

120 Cong.Rec. S34386 (1974) (emphasis added).

Similarly, a summary of the House Bill prepared by the Center for Public Financing of Elections, inserted into the record during the House floor debates on the Conference Report by Congressman Young of Georgia, noted that the bill "[r]emoves Hatch Act restrictions on voluntary activities by State and local employees in federal campaigns, *if not otherwise prohibited by State law.*" 120 Cong.Rec. 35145 (1974) (emphasis added).

The value of the legislative history just discussed is not diminished simply because the immediate discussion focused on amendments to Title 5 of the United States Code, while the regulation of contributions and the language of preemption are codified in Title 2. The 1974 amendatory act modified provisions of Titles 2, 5, 18, 26 and 47. It is highly unlikely that the debaters mentally sorted the several provisions of the bill before them ac-

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8. The phrase, "but superseded" seems to be inconsistent with the context and undoubtedly should read "or superseded."

cording to title. The debates help us in showing what Congress was trying to do and what it was not trying to do.

It is apparent from the foregoing that Congress did not intend, in enacting § 453, to preempt a broad field of state law. The legislative history, rather, reveals a manifest Congressional purpose of not preempting state law regulating the political activities of state or local public employees, whether or not related to federal elections. The amendatory act of 1974 preempts the field only with respect to candidates and their campaign committees. We conclude, therefore, that § 84.830, RSMo 1978, is not a law "with respect to election to federal office," within the scope of § 453.

II. First Amendment

The trial court also held that the respondent had a first amendment right to make the contribution in issue. Numerous cases, decided over the years, hold that political activities of public servants may be substantially restricted, even though like activities on the part of private citizens would be strongly protected by the first amendment.

The case of *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892) dealt with the termination of a police officer for violation of department regulations by membership in a party committee, and also by soliciting political contributions. Justice Oliver Wendell Holmes expressed himself with his usual eloquence, as follows:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the

> implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. . . .

The venerable jurist undoubtedly overwrote to the extent that his opinion suggests that public employees may be disciplined if they simply "talk politices," but his words nevertheless illustrate an important point. The activities involved in the case before him were of a kind which are clearly subject to regulation, as the citations below demonstrate, and his lesson remains valuable in demonstrating that public employees may appropriately be subjected to special regulations covering political activities.

Limitations on campaign contributions concededly involve substantial first amendment rights. These rights comprehend both freedom of association and freedom of expression. *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Section 84.830 bans all political campaign contributions and prevents the "symbolic expression of support evidenced by a contribution." 424 U.S. at 21, 96 S.Ct. at 635.

The United States Supreme Court has recognized that the government's interest in regulating both the conduct and speech of its employees differs significantly from its interest in regulating those activities of the citizenry in general. *United Public Workers of America v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 564, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973); *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). This governmental interest is even stronger, if anything, in its ap-

plication to policemen as compared to other government employees.[9]

Federal, state and local governments have the right to place restrictions on the political conduct of their employees when "such restrictions serve valid and important state interests." *Broadrick v. Oklahoma,* 413 U.S. 601, 606, 93 S. Ct. 2908, 2912, 37 L.Ed.2d 830 (1973). The goal is to balance the interest of the employee as a citizen, in exercising first amendment rights, and the interest of the government, as an employer, in promoting the efficiency and impartiality of public services. *Pickering v. Board of Education,* 391 U.S. at 568, 88 S.Ct. at 1734. The important governmental interests present in the instant case are described in the introductory portion of this opinion.

Buckley v. Valeo, supra, after making it clear that political contributions and expenditures are within the protection of the first amendment, went on to sustain substantial restrictions. The Court upheld very strict limits on individual contributions, even though the limitations would necessarily preclude affluent persons from using their means as fully as they might like in the promotion of favored political causes. The opinion observed that a restriction on contributions is much less intrusive than a restriction on the rights of association, expression and assembly, which, insofar as public employees are concerned, are concededly subject to substantial limitation.

We of course recognize the state's burden of establishing, when rights protected by the first amendment are re-

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9. *Otten v. Schicker,* 492 F.Supp. 455, 457 (E.D.Mo.1980), *aff'd,* 655 F.2d 142 (8th Cir.1981). *See also* Finck *Nonpartisan Speech in the Police Department: The Aftermath of Pickering,* 7 Hastings Const.L.Q. 1001, 1011-14 (1980); Note, *The Policeman: Must He Be A Second-Class Citizen With Regard To His First Amendment Rights?* 46 N.Y.U.L.Rev. 536, 537-39 (1971).

stricted in the interest of other public purposes, that the means employed are the least restrictive appropriate to the task.[10] The legislature well might have believed, however, that any of the limitations on the statute suggested by the respondent or by the trial court would frustrate its purpose.

It is suggested that a prohibition on all political contributions by city police officers is more restrictive than is necessary to promote the important state interests involved, while a prohibition limited to local campaigns, or to state and local campaigns, might stand. The legislature would have good reason to think that a prohibition which did not extend to federal candidates and federal elections would be futile. The two major parties operate on a national basis and function in federal, state and local contests. *See* dissenting opinion of Justice Powell in *Branti v. Finkel,* 445 U.S. 507, 521, 100 S.Ct. 1287, 1296, 63 L.Ed.2d 574 (1980). Candidates at all three levels run in the August primary and in the November general elections. A contribution to a congressional candidate well might benefit the local politicians who have made common cause with that candidate. The primary, moreover, is an integral part of the electoral process. *United States v. Classic,* 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944).

Only scanty authority is cited for the suggestion that a limitation on contributions to national campaigns goes too

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10. *See Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). *See also NAACP v. Alabama,* 377 U.S. 288, 307-08, 84 S.Ct. 1302, 1313-14, 12 L.Ed.2d 325 (1964); *Louisiana ex rel. Gremillion v. NAACP,* 366 U.S. 293, 81 S.Ct. 1333, 6 L.Ed.2d 301 (1961); *Talley v. California,* 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960); *American Communications Association v. Douds,* 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950); *Schneider v. State,* 308 U.S. 147, 161-65, 60 S.Ct. 146, 150-52, 84 L.Ed. 155 (1939).

far. *Bruno v. Garsaud,* 594 F.2d 1062, 1064 (5th Cir. 1979), contains no analysis and purest dicta in its questioning of the validity of a prohibition against contributions to national political causes by employees of local governments. The opinion complained of the inadequacy of the record before the court, whereas the present record is quite complete on the need for regulation. *Wachsman v. City of Dallas,* 704 F.2d 160 (5th Cir. 1983), *cert. denied,* ..... U.S. ....., 104 S.Ct. 537, 78 L.Ed.2d 717 (1983) dealt with a prohibition on contributions for city council races only, and so there was no occasion to express a conclusion on the issues now before us. The court simply explained why the *Bruno* dictum did not apply. These cases do not shake our conclusion.

The interest of the State of Missouri in regulating contributions by police officers to national candidates is all the stronger insofar as the Kansas City Police Department is concerned because the department has been substantially removed from local control and constituted an instrumentality of the state by the legislation of which § 84.830 is a part. *See State ex rel. Spink v. Kemp,* 365 Mo. 368, 283 S.W.2d 502 (banc 1955). State and national politics have a very close relationship.

The trial judge found that the statute is unconstitutionally overbroad in that it restricts activities relating to "nonpartisan" elections as well as partisan ones. There is ample precedent for regulating the political activities of public employees in elections in which candidates are elected, and which are nonpartisan only in the sense that party labels do not appear on the ballot. *Wachsman v. City of Dallas, supra; Magill v. Lynch,* 560 F.2d 22 (1st Cir.1977). Parties may play substantial roles in elections from which their labels are barred. We take judicial notice

that elections under Kansas City's Charter,[11] which has been in effect since 1926, are "nonpartisan," and that the problems described in evidence arose while this charter was in operation. The statute may properly be applied to all elections at which candidates stand for office.

In determining claims of overbreadth, our construction of the statute is definitive and we are obliged to give it a construction which will render it valid, if possible. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *Elder v. Rampton,* 413 U.S. 902, 93 S.Ct. 3062, 37 L.Ed.2d 1020 (1973); *Mining v. Wheeler,* 378 F.Supp. 1115 (W.D.Mo.1974). The statutory language of "political party, political club, or any political purpose whatsoever," with construction aided by the familiar maxims of *ejusdem generis*[12] and *noscitur a sociis,*[13] bespeaks elections at which candidates stand for public office. The respondent's conduct is appropriately regulated, as we have held, and the statute does not cast a shadow on the lawfulness of conduct of others which is beyond the scope of regulation.

Least substantial of all is the suggestion that the total ban on political contribution is more restrictive than nec-

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11. Our Court can take judicial notice of the provisions of the Kansas City home rule charter. Mo. Const. art. VI, § 19. *See State ex rel. Voss v. Davis,* 418 S.W.2d 163, 172 (Mo.1967); *Nastasio v. Cinnamon,* 295 S.W.2d 117, 120 (Mo.1956).

12. The rule of *ejusdem generis,* an aid to statutory construction problems, suggests "that where general words follow a specific enumeration of person or things, the general words should be limited to persons or things similar to those specifically enumerated." *United States v. Turkette,* 452 U.S. 576, 581, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981), *citing* 2A Sands, *Sutherland on Statutory Construction* § 47.17 (4th ed. 1973).

13. "The maxim *noscitur a sociis,* that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth . . ." in statutory construction. *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961).

essary, and that a limitation on the amounts would sufficiently serve the legislature's purpose. The modest contributor makes a public record and a public demonstration of support. *Buckley v. Valeo,* 424 U.S. 20-21, 96 S.Ct. 635. The legislature could properly conclude that this is the very demonstration a police officer should not make. With the large number of officers on a metropolitan police force, moreover, the aggregation of small donations could produce a substantial sum. There was reason for the legislature to conclude that nothing short of a total ban would respond to the evils shown by the evidence.

The cases furnish ample justification for regulations against police officers serving on political committees, working at the polls, raising political funds, running for public office, and engaging in similar activities designed to promote political causes and to advance the fortunes of candidates. A total ban on political contributions is a restriction of the same nature, and undoubtedly less intrusive than some regulations which have been consistently sustained. *See Buckley v. Valeo,* 424 U.S. at 20, 96 S.Ct. at 635.

The Supreme Court has used varying language in expostulating on the public interest which must be shown to justify limitations on rights which are within the aura of the first amendment's protection. *Buckley v. Valeo, supra,* refers at page 64, 96 S.Ct. at page 656 to "exacting constitutional scrutiny," and at other places to "weighty interests" and "substantial governmental interests." *Id.* at 29, 68, 96 S.Ct. at 640, 658. *Broaderick v. Oklahoma, supra,* speaks 413 U.S. at pages 611-12, 93 S.Ct. at page 2915 or "compelling needs of society." *Letter Carriers, supra,* 413 U.S. at page 564, 93 S.Ct. at page 2890, mentions "important interests." These are the decisions we deem most supportive of our conclusion. Other recent

cases use the phrase "compelling government interest." *See Press-Enterprise Corporation v. Superior Court of California,* ..... U.S. ....., ..., 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984); *Brown v. Socialist Workers, '74 Campaign Committee,* ..... U.S. ....., 103 S.Ct. 416, 420, 74 L.Ed.2d 250 (1982). We find no discussion which is particularly helpful in showing how the differences in phraseology just described might be quantified, but do not hesitate to say that the interest of the state in protecting a metropolitan police department from political domination and influence is substantial, significant, important and compelling. The quotation in Judge Donnelly's opinion well analyzes the interests involved, and the need for regulation to protect these interests is well developed in the evidence.

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), cited by the respondent and in the dissent, and the companion case of *Branti v. Finkel, supra,* are completely distinguishable because in each case the limitation on freedom of political association of the discharged employees was not designed to serve any public interest. The interest, rather, was personal to the public official who, on assuming office, undertook to terminate subordinates simply because they adhered to the opposing political party.

III.

It is finally alleged in the petition that § 84.830 violates the Equal Protection Clause of the United States Constitution. This argument was not relied on by the trial court or briefed on appeal. It is also lacking in merit. Statutes analogous to the one here involved have withstood similar attacks. *See, Otten v. Schicker,* 655 F.2d 142, 146 (8th Cir.1981), *aff'ing,* 492 F.Supp. 455, 459 (E.D.Mo.1980).

The judgments are reversed and the cases are remanded with directions to dismiss the petition.

RENDLEN, C.J., and HIGGINS, GUNN, and BILLINGS, JJ., concur.

WELLIVER and DONNELLY, JJ., dissent in separate opinions filed.

WELLIVER, Judge, dissenting.

I respectfully dissent. After examining the legislative history of the Federal Election Campaign Act of 1974, I believe it is questionable whether Congress intended that Act to preempt all state and local enactments regulating the conduct of state and local government employees in the campaigns of federal elective officers. Nevertheless, I believe we should affirm the judgment of the trial court because § 84.830, RSMo 1978, as applied in this case, impinges on rights protected by the First Amendment.

The legislature enacted § 84.830 as a means to eliminate the involvement of Kansas City police officials in campaigns for public office and to prevent the abuses of power which had occurred during an earlier turbulent period of that city's history. While designed to serve meritorious purposes, it is manifest that the statute also implicates the rights of expression and association protected by the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 21-25, 96 S.Ct. 612, 635-37, 46 L.Ed.2d 659 (1976). Whether the statute constitutes a permissible infringement on these First Amendment rights is determined by weighing the magnitude of the state's interest in regulating respondent's conduct. The Fifth Circuit recently articulated a useful method of analysis:

> The standard to be applied . . . is a function of the severity of impairment of first amendment in-

> terests. As the burden comes closer to impairing core first amendment values, . . . or impairs some given first amendment value more substantially, . . . the requisite closeness of fit of means and end increases accordingly. . . . [R]estrictions on the partisan political activity of public employees and officers, where such activity contains substantial nonspeech elements, . . . are constitutionally permissible if justified by a reasonable necessity . . . to burden those activities to achieve a *compelling public objective.*

Wachsmann v. City of Dallas, 704 F.2d 160 (5th Cir.), *cert. denied,* ..... U.S. ....., 104 S.Ct. 537, 78 L.Ed.2d 717 (1983), *quoting Morial v. Judiciary Commission,* 565 F.2d 295, 300 (5th Cir.1977) (en banc), *cert. denied,* 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed.2d 395 (1978) (emphasis added).

The United States Supreme Court in *Buckley v. Valeo* recognized that the First Amendment permits reasonable limitations on the right to contribute to election campaigns. *Wachsmann v. City of Dallas* provides an example of a regulation which permissibly restricts a government employee's right to make a campaign contribution. The Fifth Circuit there sustained a municipal ordinance prohibiting contributions by city employees to candidates for the city council. The Court identified several special circumstances present in that case that tended to justify the prohibition. First the ordinance proscribed contributions only to a limited category of elective offices. Second, these offices had a close nexus to the government employees affected by the ordinance. Finally, the ordinance left employees with the opportunity to exercise their right to contribute in other elections. The court observed: "But here, while it is absolute, the ban is on contributions in a particular type

of election, not all elections. It is directly tied to the City's interest." 704 F.2d at 174. The Fifth Circuit expressed a similar view in *Bruno v. Garsaud,* 594 F.2d 1062, 1064 (5th Cir.1979).

In contrast to the ordinance in *Wachsmann,* § 84.830 would appear to prohibit contributions in all campaigns, be they for local, state or federal office. For this reason, I believe we must hold the statute unconstitutional as applied in this case unless the state demonstrates that it is necessary for achieving compelling governmental objectives. In my opinion, the state's interest may be sufficiently compelling to warrant a prohibition on contributions to candidates for state office, as well as candidates for city office. But this is not the question before us. Our concern here is finding a state interest in totally prohibiting campaign contributions to candidates for federal office. I fail to see what deleterious effects would result from a contribution to a candidate for Congress by a Kansas City police officer or, for that matter, by a judge of this Court. The potential for abuses of the kind § 84.830 was designed to correct simply is not that great in the case of candidates for federal office. Therefore, I believe the state's interest does not rise to the level of being "compelling" with respect to such campaigns. Given the protected nature of the rights at stake in this case, *Buckley v. Valeo, supra,* I believe the principal opinion accords the legislature far too much discretion in determining the means to be used to accomplish its purpose. For the foregoing reasons, I too would hold § 84.830, insofar as it totally prohibits contributions to a candidate for federal office, unconstitutional as applied.

DONNELLY, Judge, dissenting.

This is an appeal from an order reinstating respondent as an officer of the Kansas City, Missouri Police Depart-

ment. While an officer in the Kansas City Police Department, respondent made a $1,000 contribution to the campaign committee of John Carnes, a candidate for election to the United States House of Representatives. Respondent was charged with violating § 84.830, RSMo 1978, which prohibits any Kansas City police officer from contributing to any political party, club or purpose:

> "No officer or employee in the service of said police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatever."

After affording respondent a hearing on the matter, the Board of Police Commissioners ordered him discharged from the police force. Respondent petitioned the Circuit Court of Jackson County for injunctive and declaratory relief. Respondent challenged the constitutionality of § 84.830, alleging it violates the First Amendment of the United States Constitution in that it deprives him of freedom of expression and association and freedom to participate in the political process. The trial court raised *sua sponte* the issue of whether the Federal Election Campaign Act preempts § 84.830.

The essential question on appeal is: May § 84.830, RSMo 1978, be used to deprive a Kansas City police officer of his right to make a campaign contribution to a candidate for election to the United States House of Representatives?

The Preemption Issue: On November 1, 1983, the United States Supreme Court addressed the question of preemption in *Aloha Airlines, Inc. v. Director of Taxation*

of Hawaii, ... U.S. ....., 104 S.Ct. 291, 78 L.Ed.2d 10 (1983). The teaching of *Aloha* is that when this Court is confronted with a federal statute which unambiguously preempts state law, it may not "avoid this direct conflict by looking beyond the language of [the federal statute] to Congress's purpose in enacting the statute."

In my view, preemption *as to election to Federal office* must be found from the explicit language of 2 U.S.C. § 453, which reads as follows:

> "The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office."

This Court cannot create an ambiguity where none exists. The proscriptions of § 84.830 may not be imposed in this case.

The Constitutional Issue: It is well settled that a limitation on campaign contributions involves substantial First Amendment rights. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). In this constitutionally sensitive area, a State must justify challenged applications of its laws. In *Elrod v. Burns*, 427 U.S. 347, 361, 96 S.Ct. 2673, 2683, 49 L.Ed.2d 547 (1976), the United States Supreme Court addressed the question whether a State may force a public employee to relinquish his right to political association as the price of holding a public job, and articulated the test which should be applied on this appeal: "In short, if conditioning the retention of public employment on [non-participation in the political process] is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."

The "vital government end" asserted by appellants in their brief is as follows:

> "When the political neutrality of a police department is compromised, there is a tendency for control of the department to be thereby transferred from the Chief of Police to the politicans in power at the time. * * * The public interest is jeopardized by the risk that this politicalization will adversely affect the goals of law enforcement officials, * * * and by the harm to the community engendered by the diminished reputation of its police department. * * * The department itself suffers, because this politicalization is inimical to the maintenance of a merit system of hiring and promotion, * * * and makes employment on the department less attractive to qualified recruits, * * * and because the department thereby loses the confidence and trust of the public. Permitting partisan political contributions can also have a debilitating effect on the morale, discipline, and espirit de corps of the department.
>
> "The performance of the individual officer is adversely affected by his participation in partisan politics, because he fears persistent conflicts between the unbiased discharge of his official duties and the partisan interests of the politicians to whom he has pledged support. * * * These conflicts are particularly dangerous in light of a police officer's direct contact with the electorate and the electoral process.
>
> "Finally, where as in this case, the officer who makes a public partisan political contribution functions in a supervisory capacity, the contribution has a chilling affect on the First Amendment rights of those officers under his command who are of a different political persuasion. * * *."

In my view, no state interests suggested are sufficient to justify the restriction on constitutional rights challenged on this appeal. We need not paint with a broad brush in this case. *See Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). We need not hold § 84.830 unconstitutional. We can "tailor and apply" § 84.830 "in a manner that avoids" such a result. *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 (1980). I would hold *only* that § 84.830 may not be used to deprive respondent of his right to make a contribution to a candidate for election to the United States House of Representatives. Section 84.830 would remain a viable constraint on political activity not related to election to Federal office.

I dissent.

APPENDIX B

IN THE
CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI

Case No. CV82-15863

Civil Docket "B"
Division 7

ROGER POLLARD,
Plaintiff,

vs.

BOARD OF POLICE COMMISSIONERS, ET AL.,
Defendants.

MEMORANDUM OPINION AND ORDER

FACTS

On July 5, 1982, plaintiff was a Sergeant on the Kansas City, Missouri Police Department. On that date, Sergeant Pollard voluntarily made a $1,000. contribution to the Carnes For Congress Committee, a committee of John Carnes, a candidate in the Democratic Primary Election for Missouri's Fifth Congressional District seat.

In accordance with the provisions of the Federal Election Campaign Act of 1971, The Carnes For Congress Committee filed a report with the Missouri Secretary of State under the provisions of Missouri Revised Statute 130.086. News of the contribution was published in the July 26, 1982 edition of the Kansas City *Star* and the July 27, 1982 edition of the Kansas City *Times*. Those articles identified Sergeant Pollard by name and stated

the amount of his contribution and identified him as a Kansas City police officer.

As a result of these newspaper articles, Sergeant Pollard's contribution came to the attention of the Kansas City, Missouri Chief of Police. On August 4, 1982, pursuant to Missouri Revised Statutes 84.600 and 84.610, Sergeant Pollard was charged with violating Missouri Revised Statute 84.830 which prohibits contributions to political parties, political clubs or for any political purpose.

A public hearing concerning that charge was held on Tuesday, August 17, 1982 pursuant to Missouri Revised Statutes 84.600 and 84.610. Sergeant Pollard was given notice of that hearing and appeared before the Board of Police Commissioners with counsel to present evidence and to cross examine witnesses. The Board made written findings of fact and conclusions of law and ordered that Sergeant Pollard be terminated as a police officer.

On August 2, 1982, Sergeant Pollard filed a petition in this Court seeking injunctive relief and declaratory judgment. Sergeant Pollard challenged the constitutionality of Missouri Revised Statute 84.830 alleging that it deprived him of freedom of expression, freedom of association and freedom to participate in the political process in violation of the First Amendment of the Federal Constitution. Sergeant Pollard further alleged that §84.830 deprived him of equal protection in violation of the Fourteenth Amendment of the Federal Constitution. On August 16, 1982, a hearing was conducted in this Division on Sergeant Pollard's application for a temporary injunction. Sergeant Pollard appeared personally at this hearing and with counsel, Mr. Gerald Rosen. The defendants appeared through attorney Manfred Maier. Evidence was

heard and the Court denied Sergeant Pollard's request for temporary injunction and requested the parties to submit briefs on the merits. Briefs were submitted by the parties and on September 16, 1982, this Court set a hearing on the merits of this case for September 30, 1982. On September 30, 1982, the plaintiff appeared through attorney, Mr. Gerald Rosen, and defendants appeared through attorneys Karl F. Schmidt, J. Emmett Logan and Manfred Maier. Evidence was heard and the Court, at the close of the evidence, posed three questions upon which the parties were requested to file post-trial briefs. The Court then took the matter under advisement.

SUMMARY OF TESTIMONY

On August 16, 1982, at the hearing on the temporary injunction, Officer Pollard testified that on July 5, 1982, at the request of a friend, he made a voluntary contribution to the primary election campaign of John Carnes, a candidate for the Democratic nomination for U.S. Congress from the Fifth Congressional District of Missouri. The contribution was made while off duty and Officer Pollard was not in uniform at the time. Sergeant Pollard testified that at the time he made this contribution, he had been a member of the Kansas City Police Department for approximately ten years; that at the time of the contribution, he did not believe he was violating the law in making a $1,000. contribution and that this contribution was voluntary. On cross examination, Sergeant Pollard admitted that he might have signed an affidavit at the time he was at the Police Academy indicating a prohibition of political contributions such as contained in §84.830 of the Revised Statutes of Missouri. Sergeant Pollard further stated that he did not recall such a prohibition at the time of the contribution on July 5, 1982. Sergeant

Pollard also testified that he had substantial outside income other than his income from the Kansas City, Missouri Police Department.

Defendants requested, at the hearing on August 15, 1982, that the Court take judicial notice of §84.830 of the Revised Statutes of Missouri. Defendants did not, however, present any further testimony at the August 16th hearing.

At the hearing on the merits on September 30, 1982, Sergeant Pollard presented no testimony. The defendants offered a deposition of Major John Halvey and Plaintiff's Exhibit No. 1, a collection of newspaper clippings from the 1930's.

Ilus W. Davis, former mayor of Kansas City, Missouri, testified concerning his personal experiences of corruption in the Kansas City, Missouri Police Department in the 1930's. Mr. Davis indicated that during that period of time, local politicians exercised a strong political influence on the Kansas City Police Department. Mr. Davis further stated that jobs were often held because of political contributions and that political influence often affected the morale of the Kansas City, Missouri Police Department. Mayor Davis testified that, in his opinion, the purpose of §84.830 was to prohibit such influence in the police department, to protect the public's confidence in the police department and to maintain the morale of the police department. Mayor Davis further testified that this Section is needed today and that because of the subtleties of politics, any allowed political contributions by members of the Kansas City, Missouri Police Department would affect these state interests.

Mr. John Ross Kuefel, a Professor of Administration of Justice at Wichita State University, testified concerning

the history of the Kansas City, Missouri Police Department from 1875 to 1932, from 1932 to 1939 and from 1940 to the present. Dr. Kuefel related much of the specific history of the 1930's. Dr. Kuefel stated that political influence usurps control of discretion of the police department, undermines the public's confidence in the police department and affects police morale.

Chief Norman Caron testified as to the effect of politics on the police department in the 1930's. He described the "cut and lug" and stated that since the passage of Missouri Revised Statute 84.830, there have not been any problems associated with political influence in the Kansas City, Missouri Police Department. Chief Caron testified that in order to control any city, you must control the police department. He expressed a fear that voluntary contributions often become the norm and a subsequent refusal becomes the exception. Chief Caron testified that you cannot have a merit system in the police department under the patronage system. He further testified that a non-partisan police force was necessary to instill public confidence in the police department. Chief Caron also stated that political influence prevents the police leadership from controlling the police department, that politics affect the morale of the police department and have a very negative effect upon recruiting police officers.

Chief Caron further testified that police officers are different from ordinary citizens because of the power they possess. He stated that in his opinion, citizens need to feel that their rights will be protected, regardless of their political beliefs, and only a non-partisan police department can convey this image. Chief Caron further testified that in his opinion, this law was needed today.

At the end of the oral evidence, both parties stipulated that the political contribution on the part of Sergeant Pollard was required by law to be reported to the Missouri Secretary of State. The Court then posed three questions:

1. Does Title II U.S.C.A. §453 (Federal Election Campaign Act of 1971, as amended in 1974) preempt the field as to contributions to federal elections.
2. Can the State totally prohibit contributions by police officers, and
3. Can the State prohibit political contributions in elections other than State elections and the elections of its political subdivisions.

LEGAL CONCLUSIONS

I

THE FEDERAL ELECTION CAMPAIGN ACT OF 1971 AS AMENDED IN 1974 DOES PREEMPT THE FIELD AS TO FEDERAL CONTRIBUTIONS

Title II U.S.C.A. §453 reads as follows:

STATE LAWS AFFECTED

The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

In 1971, §403 read as follows:

EFFECT ON STATE LAWS

Sec. 403. (a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of State law, except where compliance with such provision of law would result in a violation of a provision of this Act.

(b) Notwithstanding subsection (a), no provision of State law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure (as such term is defined in 301(f) of this Act) which he could lawfully make under this Act.

The purpose of the Federal Election Campaign Act of 1971 was to "deal with the communications media, campaign contributions, disclosure and reporting requirements and tax incentives to encourage the small donor to contribute to the candidate or party of his choice." *See* Legislative History, 1972 U.S. Code Cong. & Ad. News at 1786.

The purpose of the Federal Election Campaign Act Amendments of 1974 was "to impose overall limitations on campaign expenditures and political contributions; to provide that each candidate for Federal office shall designate a principal campaign committee; to provide for a single reporting responsibility with respect to receipts and expenditures by certain political committees; to change the times for filing of reports regarding campaign expenditures and political contributions; to provide for public financing of Presidential nominating conventions and Presidential primary elections; and for other purposes." *See* Legislative History, 1974 U.S. Code Cong. & Ad. News at 1436.

It should be noted that with the exception of two states mentioned below, neither the 1971 Act nor the 1974 Amendments conflict with the state Hatch Acts.

The defendants urge that §453 is not applicable to private contributions by police officers. In support of this proposition, they cite a legislative history which will indicate an intent of the conferees that any state law

regarding political activities of state and local officers and employees is not preempted or superseded by amendments to Title V. The amendments to Title V specifically removed a provision in the U.S. Hatch Act prohibiting a state or local officer or employee from taking an active part in political management or political campaigns. *See* 5 U.S.C.A. §1502(a). Defendants urge that the 1974 amendment indicated an intent that Federal law preempt the field only insofar as applicable to requirements concerning reporting, disclosure and spending limitations imposed on candidates for Federal office.

Defendant's position is directly refuted by the report of the committee wherein the following was stated:

> The committee bill contains two separate provisions relating to the preemption of State laws. One is contained in title III of the bill and amends section 403 of the Federal Election Campaign Act of 1971 to provide that the provisions of that Act, as amended by this legislaiton, (sic.) supersede and preempt any provision of State law with respect to election to Federal office. It is the intent of the committee to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated.
>
> * * *
>
> The other preemption provision was added to title I of the bill, relating to amendments to the criminal code. This was done to make it clear that the Federal law is intended to be the sole source of criminal sanctions for offenses involving political activities in connection with Federal elections.

H.R. Rep. No. 1239, 93rd Cong., 2d Sess. 10, *reprinted in* FEC, *The Legislative History of the 1974 Amendments to the Federal Election Campaign Act* at 644. *See* also H.R. Rep. No. 1438, 93rd Cong., 2d Sess. 100, 101 *reprinted in* FEC, *The Legislative History of the 1974 Amendments to the Federal Election Campaign Act* at 1044, where the following is stated:

> The conference substitute follows the House amendment. It is clear that the Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect State laws as to the manner of qualifying as a candidate, or the dates and place of elections.

This Court feels that the legislative history indicates an intent on the part of the Congress to preempt the field. The Court further feels bound to accept the clear wording of this Act. See *Kaufmann v. United States,* 227 F.Supp. 807 (W.D. Mo. 1963), *appeal dismissed,* 328 F.2d 619 (8th Cir. 1964) at 813, wherein the Court stated that:

> Legislative history, of course, may be considered by the courts in determining Congressional intent. However, where the legislative history or the Committee Report are not in accord with the clear meaning of the words used in the Act itself, then the court is bound by the clear and commonly understood meaning of the Act and may not consider the Committee Report.

This Court reviewed the little Hatch Acts of the fifty states to determine what state laws, if any, would be affected by adopting the clear wording of the Act. This review indicated that only the states of Louisiana

and Missouri had statutes totally prohibiting political contributions. The state of Louisiana has both constitutional and statutory provisions prohibiting all contributions. *See* Article X, §9 of the Louisiana Constitution entitled "Prohibitions Against Political Activities" and LSA-R.S. 33:2429, subd. B.

The state of Missouri has only one statute which specifically prohibits contributions by police officers, the section involved in this case, §84.830 R.S.Mo. The statute applicable to the City of St. Louis, Missouri is §84.170 R.S.Mo. This section does not specifically prohibit political contributions by police officers. The rules of the St. Louis Police Department were not admitted into evidence and we cannot state that they specifically prohibit contributions. The other Missouri statute affecting the political activities of police officers would be §43.060 R.S.Mo. This section controls the political activities of the Missouri Highway Patrol. The section does not specifically probihit contributions by members of the Highway Patrol. The rules applicable to the Highway Patrol were not admitted into evidence and we do not know whether or not these rules prohibit political contributions.

Both the applicable section of the Louisiana State Constitution and the Louisiana statutory provision were called into question in the case of *Bruno v. Garsaud,* 594 F.2d 1062, 1064 (5th Cir. 1979), wherein the Court stated:

> We reach this conclusion despite our strong doubts that L.S.A. R.S. 33:2429(B) could constitutionally be enforced to prohibit Louisiana classified employees, at least when acting as private citizens without any fanfare or publicity, from making contributions to a political candidate or party, Cf. *Buckley v. Valeo,* 1976, 424 U.S. 1, 12-38, 96 S.Ct. 612, 46 L.Ed.2d 659.

> Insofar as the statute does purport to proscribe altogether this constitutionally protected conduct, it sweeps too broadly.

For a review of the majority of the citations of the state Hatch Acts, see *Broadrick vs. Oklahoma,* 413 U.S. 601 at 603, footnote 2, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

With respect to defendants' position that 2 U.S.C.A. §453 applies to candidates only, there is no indication in the legislative history that this was the intent of the Congress. This construction is directly opposed to the clear wording of the section involved.

Accordingly, this Court finds that 2 U.S.C.A. §453 does preempt the field of contributions to federal elections and specifically, the contribution made by Sergeant Pollard.

II

THE GENERAL ASSEMBLY CANNOT TOTALLY PROHIBIT CONTRIBUTIONS BY POLICE OFFICERS

The importance of this issue requires a general discussion of the constitutionality of the prohibitions against any political contributions by members of the police department as set forth in §84.830 R.S.Mo.

A review of the history concerning curtailment of political activities of public employees will be found in the following cases: *Ex parte Curtis,* 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1882); *United Public Workers Of America (C.I.O.) v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 600, 37 L.Ed.2d 830 (1973); *United*

States Civil Service Commission v. National Association Of Letter Carriers, AFL-CIO, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *Elrod v. Burns,* 427 U.S. 347, 97 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

The following cases have discussed little Hatch Act applications as applied to the activities of police officers: *Gray v. City of Toledo,* 323 F.Supp. 1281 (N.D. Ohio 1971); *Bruno v. Garsaud,* 594 F.2d 1062 (5th Cir. 1979); *Otten v. Schicker,* 655 F.2d 142 (8th Cir. 1981); *Paulos v. Breier,* 507 F.2d 1383 (7th Cir. 1974); *Hickman v. City of Dallas,* 475 F.Supp. 137 (N.D. Texas 1979); *Bolin v. Minnesota Department of Public Safety,* 313 N.W.2d 381 (Minn. 1981); *Reussow v. Eddington,* 483 F.Supp. 739 (D.Colo. 1980); *McNea v. Garey,* 434 F.Supp. 95 (N.D.Ohio 1976). None of the police officer cases deal directly with the issue of totally prohibiting contributions. Furthermore, we have found no such cases.

For a general discussion of the doctrine of overbreadth of legislation as opposed to vagueness, see the annotation following *Erznoznik v. Jacksonville,* 45 L.Ed. 2d 725 at 736, wherein the Court stated:

> [T]he distinction between the doctrines of overbreadth and vagueness is that the overbreadth doctrine is applicable primarily in the First Amendment area (see §7, infra) and may render void legislation which is lacking neither in clarity nor precision, whereas the vagueness doctrine is rested on the due process clauses of the Fifth and Fourteenth Amendments and is applicable solely to legislation which is lacking in clarity and precision.

For a review of the constitutionality of the Federal Election Campaign Act, see *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

It should also be noted that in reviewing the history of this problem, the courts have used various terms to describe the "test" applied. *See Connealy v. Walsh,* 412 F.Supp. 146 (W.D. Mo. 1976) wherein the Court stated at 155:

> The precise nature of defendant's burden has not been clearly established. Several courts have stated that the applicable test is ". . . whether the exercise of First Amendment rights has been clearly demonstrated to work a material and substantial interference with plaintiff's duties." *Smith v. United States, supra,* at 517; *Smith v. Losee, supra.* Other courts have phrased the applicable test in terms of whether plaintiff's activities in fact interfered with or impeded the efficiency of public services performed by plaintiff. *Bertot v. School District No. 1, Albany Co., Wyoming,* 522 F.2d 1171 (10th Cir. 1975); *Roseman v. Indiana University of Pennsylvania, at Indiana, supra; Jannetta v. Cole,* 493 F.2d 1334 (4th Cir. 1974). Still other courts have employed a balancing test to determine whether valid governmental interests "outweigh" the plaintiff's First Amendment interests. *Paulos v. Breier,* 507 F.2d 1383 (7th Cir. 1974); *Bates v. Dause,* 502 F.2d 865 (6th Cir. 1974); *Phillips v. Adult Probation Dept., City and County of San Francisco, supra.* Two courts have required the state to demonstrate that an "overwhelming countervailing state interest" or a "compelling state interest" pertaining to plaintiff's employment justified the restriction of First Amendment activity. *Kiiskila v. Nichols,* 433 F.2d 745, 749 (7th Cir. 1970); *Hobbs v. Thompson, supra,* at 475. *Cf. Kelley v. Johnson, supra.*

This Court prefers the "means test". It is not enough that the means chosen in furtherance of the interest be

rationally related to that end. *Sherbert v. Verner,* 374 U.S. 398, at 406, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights. *United Public Workers of America (C.I.O.) v. Mitchell,* 330 U.S. 75 at 96, 67 S.Ct. 556, 91 L.Ed. 754 (1947) and finally, the government must employ means closely drawn to avoid unnecessary abridgment. *Buckley v. Valeo,* 424 U.S. 1 at 20, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

All the above citations with respect to the means test can be found in the case of *McNea v. Garey,* 434 F.Supp. 95 (N.D.Ohio 1976). *See* specifically page 110, wherein the United States District Court in *McNea, supra,* quoted from the language of the United States Supreme Court in *Elrod v. Burns, supra* at 362, 363 as follows:

> Precision of regulation must be the touchstone in an area so closely touching most precious freedoms. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. *Kusper v. Pontikes,* 414 U.S. 51 at 59, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973).

It should be noted here that there is no evidence of any direct interference with Sergeant Pollard's duties as a result of his political contribution. The only publicity connected with this matter was the newspaper articles concerning Sergeant Pollard's making of a contribution to a candidate in a Federal election. There is also no evidence that Sergeant Pollard made the contribution while on duty or while in uniform. The burden in this case is on the defendants to prove that the valid state interest here justified the restriction on freedom of expression. *See Smith v. United States,* 502 F.2d 512 at 517 (5th Cir. 1974) and

Roseman v. Indiana University of Pennsylvania, at Indiana, 520 F.2d 1364 (3rd Cir. 1975). Sergeant Pollard did not give up all of his First Amendment rights simply because he accepted public employment. *See Reussow v. Eddington,* 483 F.Supp. 739 at 744 (1980) and *Gray v. City of Toledo,* 323 F.Supp. 1281 at 1289 (1971). All of the means used in §84.830 R.S.Mo. significantly impair Sergeant Pollard's rights and must, therefore, survive exacting scrutiny. *See Buckley v. Valeo, supra,* at 94. The *Buckley* case further states at 656, that the encroachment cannot be justified by the mere showing of a legitimate state interest.

In this case, the evidence shows that defendants have established, without doubt, a vital state interest in eliminating corruption from the police department, in eliminating political influence in order that the police department may be effectively run by the Board of Police Commissioners through its Chief, that there must be public confidence in police officers and that political influence will affect the morale of the police department. The defendants have not shown, however, how the making of a private political contribution has affected the duties of Sergeant Pollard. The mere quoting of an opinion to the effect that politics are very subtle, does not satisfy the defendants' burden of proof. In addition, the Court's search of the laws of the United States and the fifty states reflects only two states that have even attempted to totally prohibit political contributions. This Court finds it difficult to justify how Kansas City can be so different from all other cities of similar size in the United States.

We are, therefore, forced to the conclusion that §84.830 R.S.Mo. as it applies to political contributions, is overbroad. We therefore, hold that §84.830, R.S.Mo., pertaining to the total prohibition of political contributions, is unconstitutional as applied to the facts of this case.

Because of the Court's finding on points I and II, the Court feels that it is unnecessary to discuss the answers to point II.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that defendants reinstate Sergeant Pollard as a member of the Kansas City, Missouri Department with no interruption of his rights as a police officer, that they reimburse him for all pay lost because of his termination and that he be reimbursed attorneys fees and costs incurred in bringing this 42 U.S.C.A. §1983 action.

The attorney for the plaintiff is directed to contact the clerk of this Court to set a date for a hearing of evidence pertaining to attorneys fees.

/s/ William F. Mauer
William F. Mauer, Judge

DATED 10/28/82

APPENDIX C

Constitutional and Statutory Provisions

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Amendment XIV

Section 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

STATUTES

2 U.S.C. § 453. STATE LAWS AFFECTED

The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

R.S.MO. §84.830 (1978). POLICE DEPARTMENT—PROHIBITED ACTIVITIES—(KANSAS CITY)

1. No person shall solicit orally, or by letter or otherwise, or shall be in any manner concerned in soliciting, any assessment, contribution, or payment for any political purpose whatsoever from any officer or employee in the service of the police department for such cities or from members of the said police board. No officer, agent, or employee of the police department of such cities shall per-

mit any such solicitation in any building or room occupied for the discharge of the official duties of the said department. No officer or employee in the service of said police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatever.

2. No officer or employee of said department shall promote, remove, or reduce any other official or employee, or promise or threaten to do so, for withholding or refusing to make any contribution for any political party or purpose or club, or for refusal to render any political service, and shall not directly or indirectly attempt to coerce, command, or advise any other officer or employee to make any such contribution or render any such service. No officer or employee in the service of said department or member of the police board shall use his official authority or influence for the purpose of interfering with any election or any nomination for office, or affecting the result thereof. No officer or employee of such department shall be a member or official of any committee of any political party, or be a ward committee man or committee woman, nor shall any officer or employee solicit any person to vote for or against any candidate for public office, or "poll precincts" or be connected with other political work of similar character on behalf of any political organization, party, or candidate. All such persons shall, however, retain the right to vote as they may choose and to express their opinions on all political subjects and candidates.

3. No question in any examination shall relate to political or religious opinions or affiliations, and no appoint-

ment, transfer, layoff, promotion, reduction, suspension, or removal shall be affected by such opinions or affiliations.

4. No person shall make false statement, certification, mark, rating, or report with regard to any tests, certificate, or appointment made under any provision of sections 84.350 to 84.860 or in any manner commit or attempt to commit any fraud preventing the impartial execution of this section or any provision thereof.

5. No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion to, or any advancement in, a position in the service of the police departments of such cities.

6. No person shall defeat, deceive, or obstruct any person in his right to examination, eligibility, certification, appointment or promotion under sections 84.350 to 84.860, or furnish to any person any such secret information for the purpose of affecting the right or prospects of any person with respect to employment in the police departments of such cities.

7. Any officer or any employee of the police department of such cities who shall be found by the board to have violated any of the provisions of this section shall be discharged forthwith from said service. It shall be the duty of the chief of police to prefer charges against any such offending person at once. Any member of the board or of the common council of such cities may bring suit to restrain payment of compensation to any such offending officer or employee and, as an additional remedy, any such member of the board or of the common council of such cities may also apply to the circuit court for a writ of mandamus to compel the dismissal of such offending of-

ficer or employee. Officers or employees discharged by such mandamus shall have no right of review before the police board. Any person dismissed or convicted under this section shall, for a period of five years, be ineligible for appointment to any position in the service of the police department of such cities or the municipal government of such cities. Any persons who shall willfully or through culpable negligence violate any of the provisions of this section may, upon conviction thereof, be punished by a fine of not less than fifty dollars and not exceeding five hundred dollars, or by imprisonment for a time not exceeding six months, or by both such fine and imprisonment.

No. 83-2076

In the Supreme Court of the United States

October Term, 1983

ROGER POLLARD,
Petitioner,

VS.

BOARD OF POLICE COMMISSIONERS AND
NORMAN A. CARON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE SUPREME COURT OF MISSOURI CORRECTLY RULE THAT THE APPLICATION OF MO. REV. STAT. § 84.830 TO PROHIBIT A PUBLIC PARTISAN POLITICAL CONTRIBUTION BY A POLICE SERGEANT DOES NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. DID THE SUPREME COURT OF MISSOURI CORRECTLY RULE THAT THE DETERMINATION OF THE MISSOURI STATE LEGISLATURE TO LIMIT THE APPLICATION OF MO. REV. STAT. § 84.830 TO OFFICERS AND EMPLOYEES OF THE KANSAS CITY POLICE DEPARTMENT DOES NOT DEPRIVE PETITIONER OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

III. DID THE SUPREME COURT OF MISSOURI CORRECTLY RULE THAT MO. REV. STAT. § 84.830 WAS NOT PREEMPTED BY THE FEDERAL ELECTION CAMPAIGN ACT?

IV. IF THE FEDERAL ELECTION CAMPAIGN ACT COULD BE CONSTRUED TO PREEMPT MO. REV. STAT. § 84.830, DOES THE PREEMPTION PROVISION OF THE ACT VIOLATE THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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No. 83-2076

In the Supreme Court of the United States

October Term, 1983

ROGER POLLARD,
Petitioner,

vs.

BOARD OF POLICE COMMISSIONERS AND NORMAN A. CARON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

OPINIONS BELOW

In addition to the opinions cited in the Petition for Writ of Certiorari, the United States Court of Appeals for the Eighth Circuit has delivered an opinion in the companion case of *Reeder v. Kansas City Board of Police Commissioners, et al.*, Case Nos. 83-1353, 83-1849. The opinion of the court of appeals was filed May 3, 1984 and is reported at 733 F.2d 543. A copy of the opinion is contained in the Appendix hereto.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in the Petition for Writ of Certiorari, this case involves the Tenth Amendment to the United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

In 1861, the Missouri State legislature abolished the local police forces of St. Louis and Kansas City and created in their place metropolitan police departments independent of the city governments. The metropolitan police forces were to be operated by boards of police commissioners appointed by the Governor. 1861 Mo. Laws Reg. Sess. 446-53; 1861 Mo. Laws Spec. Sess. 63-67. The St. Louis Police Department has been operated by such a board since that time. However, in 1932, the Supreme Court of Missouri held that the statute applicable to Kansas City constituted an unconstitutional delegation of legislative power to an administrative agency. *State ex rel. Field v. Smith,* 329 Mo. 1019, 49 S.W.2d 74 (1936) (en banc). The court's decision had the immediate effect of placing the Kansas City Police Department back under the control of the city government.

Under the home rule of the Kansas City Police Department created by *State ex rel. Field v. Smith, supra,* employment on the force, and advancement within the department, became matters of a political patronage sys-

tem operated by Thomas J. Pendergast, the local boss of the party in power at the time. Halvey Depo. at 5-6; Tr. at 44-45. The key to political control of the department was a system of contributions under which officers and employees were bonded to the local machine. Tr. at 65. Individuals were required to pledge their support of and contribute to the party in order to obtain employment on the force. Officers were required to make contributions at the time of each primary and each general election in order to retain their positions. Halvey Depo. at 7-8; Tr. at 45.

While the Kansas City Police Department was politically controlled, it gained a wide-spread reputation for selective law enforcement, dependent upon the whim of the politicians. As petitioner points out, during this period "corruption in the Police Department was rampant." Petition for Writ of Certiorari at 3. The department permitted and protected gambling, prostitution, narcotics rings, and other forms of organized crime. Tr. at 40-44, 65-66; Ex. 1, K.C. Star, December 8, 1940. The police participated in intimidation and physical abuse of voters, vote fraud and other methods to insure that the machine, of which the police department had become a part, remained in power. Ex. 1, Focus, October 1938; Citizens League Bulletin, June 3, 1939; K.C. Star, March 24, 1946.

After seven years of home rule in Kansas City, the Missouri State legislature enacted a statute designed to put an end to the corruption and voter disenfranchisement that resulted from local political control of the police department. The statute returned control of the department to a board appointed by the Governor and required the board and all members of the force to refrain from participation in any partisan political activity. Mo. Rev. Stat. § 7645 (1939). The provision of the statute at

issue herein was amended to its present form in 1943. 1943 Mo. Laws 727, § 7681, now codified as Mo. Rev. Stat. § 84.830.

The pertinent portion of § 84.830 provides:

> No officer or employee in the service of said police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatever.

Mo. Rev. Stat. § 84.830.1. The statute also provides that any officer found to have violated its provisions "shall be discharged forthwith from said service." Mo. Rev. Stat. § 84.830.7.

Petitioner is a sergeant of the Kansas City Police Department. In July of 1982 he made a $1,000.00 partisan political contribution to the Carnes for Congress Committee, the campaign committee of John Carnes, a candidate for the United States Congress in Missouri's Fifth Congressional District. News of that contribution was published in the *Kansas City Star*. The article identified petitioner as a Kansas City police officer and stated the amount of his contribution. As a result, respondents learned of the contribution and initiated disciplinary proceedings against petitioner. Petitioner then brought this action in the Circuit Court of Jackson County, Missouri to enjoin those proceedings. On October 28, 1982, the Circuit Court enjoined respondents from enforcing § 84.830 against petitioner, holding that its ban on political contributions was preempted by the Federal Election Campaign Act and violated the First Amendment to the United States Constitution.

Mark Reeder is also a sergeant of the Kansas City Police Department. Sergeant Reeder also made a partisan political contribution to the Carnes for Congress Committee in July of 1982. Sergeant Reeder's contribution was in the amount of $500.00. News of that contribution was publicized in the same manner as that of petitioner's contribution, and similar disciplinary proceedings were instituted against Sergeant Reeder. On August 10, 1982, Sergeant Reeder filed suit in the United States District Court for the Western District of Missouri to enjoin the enforcement of § 84.830 against him. That suit raises the same First Amendment, equal protection and preemption issues raised by petitioner herein.

In October of 1982, the *Reeder* case was submitted for decision on the basis of the record developed in the Jackson County Circuit Court in the *Pollard* case. On February 25, 1983, the district court adopted the holdings of the Jackson County Circuit Court and enjoined respondents from enforcing § 84.830 against Sergeant Reeder.

On March 15, 1984, the Supreme Court of Missouri reversed the decision of the Jackson County Circuit Court. The court held that the legislative history of the Federal Election Campaign Act shows clearly that Congress did not intend to preempt State laws regulating the political activity of public employees, that the prohibition of a partisan public political contribution by a police sergeant is a permissible restriction on the police sergeant's First Amendment freedom of association interests, and that the decision of the Missouri State legislature to apply that specific prohibition only to officers and employees of the Kansas City Police Department does not deprive petitioner of equal protection under the Fourteenth Amendment to the United States Constitution.

On May 3, 1984, the United States Court of Appeals for the Eighth Circuit filed an opinion holding that Mo. Rev. Stat. § 84.830 is not preempted by the Federal Election Campaign Act and does not violate the First Amendment to the United States Constitution. *Reeder v. Kansas City Board of Police Commissioners,* Nos. 83-1353, 83-1849, slip op. (8th Cir. May 3, 1984). However, the Eighth Circuit determined that the record generated in the *Pollard* case and stipulated to in the *Reeder* case was insufficient for a determination of the equal protection issue raised by Sergeant Reeder. Therefore, the court of appeals remanded the case to the district court for further proceedings. The case is pending on remand in the United States District Court for the Western District of Missouri.

SUMMARY OF ARGUMENT

Petitioner has cited no "special and important reasons" within the purview of Rule 17 of the Rules of this Court for granting review of this case by Writ of Certiorari. The issues raised by petitioner's First Amendment and equal protection arguments have previously been decided by this Court. The decision of the Supreme Court of Missouri is in accord with those prior decisions. Petitioner's preemption argument raises questions of statutory construction that are fully answered by the legislative history of the Federal Election Campaign Act. Therefore, there is no reason of the character outlined in Rule 17 for the Court to exercise its discretion to grant certiorari herein.

REASONS FOR DENYING THE WRIT

I. That a State May Constitutionally Prohibit a Police Sergeant From Making a Public Partisan Political Contribution Is Settled by Prior Decisions of This Court.

The Hatch Act provides that Federal government employees "may not . . . take an active part in political management or in political campaigns." 5 U.S.C. § 7324(a)(2). In *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1946), this Court held that provision to be a permissible restriction of government employees' freedom of expression under the First Amendment. In *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court "unhesitatingly reaffirm[ed] the *Mitchell* holding", stating that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees." *Id.* at 556. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court upheld a statute providing that no employee in the classified service of the State of Oklahoma "shall . . . take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

Mitchell, *Letter Carriers*, and *Broadrick* establish that a prohibition against direct participation in partisan political activity by government employees constitutes a permissible restriction on the employees' freedom of expression interests under the First Amendment. This result is achieved by balancing "the interests of the employee, as a citizen, in commenting upon matters of public

concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees." *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, supra* at 564. Where, as here, the only employee interest at issue is the freedom of association interest in indirect political participation through contributions of money, that balance weighs more heavily in favor of the government. *Buckley v. Valeo,* 424 U.S. 1 (1976).

In *Buckley,* the Court considered the constitutionality of provisions of the Federal Election Campaign Act that placed limitations upon political contributions by individuals and committees, and upon direct expenditures for or by candidates. The Court held that "the primary First Amendment problem raised by the Act's contribution limitations is the restriction of *one aspect of the contributor's freedom of political association.*" *Id.* at 24 (emphasis supplied). On the other hand, the Court held that the direct expenditure limitations "placed substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression." *Id.* at 58-59. Therefore, the Court upheld each of the contribution limitations and struck down each of the expenditure limitations, stating that the Act's "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions." *Id.* at 23.

The restrictions on direct partisan political activity upheld by the Supreme Court in *Mitchell, Letter Carriers,* and *Broadrick* impinged upon "core" First Amendment rights of political expression. *See Buckley v. Valeo, supra* at 44-45. The evidence below establishes that Mo. Rev. Stat. § 84.830 serves the same governmental interests held to justify those restrictions. Petitioner's challenge to the

application of that regulation to the less protected political association interest in making a public partisan political contribution creates no issue not previously resolved by decisions of this Court. The holdings of the Supreme Court of Missouri herein, and of the Eighth Circuit in *Reeder* are in accord with those prior decisions.

II. That the Determination of the Missouri State Legislature to Apply Mo. Rev. Stat. § 84.830 Only to Kansas City Police Officers and Employees Does Not Constitute a Denial of Equal Protection Is Settled by Prior Decision of This Court.

The Oklahoma statute at issue in *Broadrick v. Oklahoma, supra* prohibited political activity by employees in the classified service of the State, but did not apply to unclassified personnel. The plaintiffs, who were classified service employees, argued that this constituted a denial of equal protection under the Fourteenth Amendment. The Court rejected that contention, stating:

> The contention is somewhat odd in the context of appellants' principal claim, which is that [the statute] reaches too far rather than not far enough. *In any event, the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. See McGowan v. Maryland,* 366 U.S. 420 (1961). *And a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.*

Broadrick v. Oklahoma, supra at 607 n.5 (emphasis supplied). Petitioner's equal protection argument presents the same issues disposed of by the Court in *Broadrick*. Therefore, that argument presents no "special and important reasons" for granting certiorari.

III. That the Federal Election Campaign Act Does Not Preempt State Laws Regulating the Political Activity of State and Local Officers and Employees Is Settled by the Legislative History of the Act.

The Federal Election Campaign Act was passed in 1971 "to promote fair practices in the conduct of election campaigns for Federal political offices." S. Conf. Rep. No. 580, 92nd Cong., 2d Sess. 1, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 1866. In 1974, the Act was amended. The preemption provision on which petitioner relies was included in the 1974 Amendments to the Act.

The Conference Report on the 1974 Amendments to the Act states:

> It is the intent of the conferees that any State law regulating the political activities of State and local officers and employees is not preempted or superseded by the amendments to title 5, United States Code, made by this legislation.

S. Conf. Rep. No. 1237, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News at 5669. The House Report states that, under the 1974 Amendments to the Act, "[t]he regulation of political activities of State and local employees would be left largely to the States." H.R. Rep. No. 1239, 93rd Cong., 2d Sess. 11, *reprinted in* FEC, *The Legislative History of the 1974 Amendments to the Federal Election Campaign Act* at 645. These statements were expounded upon during the Senate floor debates on the Conference Report on the 1974 Amendments.

Senator Cannon of Nevada was the chairman of the Committee on Rules and Administration, to which the Senate bill was reported, and also the chairman of the Senate conferees. Senator Stevens of Alaska was one

of the Senate conferees. During the floor debates on the Conference Report they had the following discussion:

MR. STEVENS. Mr. President, just 1 minute. I should like to clarify something, if I may, with the manager of the bill.

A provision of this bill amends section 1502 of title 5 relating to the activity of State or local employees in Federal campaigns. Specifically, it takes out subsection (a)(3), which prohibits a State or local officer or employee from taking an active part in political management or political campaigns, and substitutes for that a prohibition from being a candidate for Federal office.

It is my understanding, and *I should like to ask the manager of the bill,* my friend from Nevada (Mr. Cannon), *if he agrees that this means that State laws which prohibit a State employee, or local laws which prohibit a local employee, from engaging in Federal campaign activities and Federal campaigns are still valid?*

What we are doing is taking out of the Federal law the prohibition against State or local employees from taking an active part in political management or political campaign? Is that correct?

I think it is quite important, because many of our States have the so-called little Hatch Act, and *it was not our intent to repeal those "little Hatch Acts," or to modify them, but to take it out of the Federal law so that Federal law does not prohibit those activities, leaving it up to the State to do so.*

MR. CANNON. *The Senator is absolutely correct.* Section 401 of the House amendment amended

section 1502 of title 5, U.S. Code, relating to influencing elections, taking part in political campaigns, prohibitions, and exceptions, to provide that State and local officers and employees may take an active part in political management and in political campaigns, except that they may not be candidates for elective office.

The conference substitute is the same as the House amendment. *It was the intent of the conferees that any State law regulating the political activity of State or local officers or employees is not preempted, but [sic][1] superseded.* We did want to make it clear that if a State has not prohibited those kinds of activities, it would be permissible in Federal elections.

This would get away from the situation in which the Federal Government gives the State funds toward many different programs, and some of those employees have been fearful that they could not participate in Federal campaigns. This would eliminate that problem.

MR. STEVENS. *It is up to the State to determine the extent to which they (public employees) may participate in Federal elections?*

MR. CANNON. *The Senator is right. The States make that determination.*

120 Cong. Rec. S 18538 (daily ed. October 8, 1974), *reprinted in* FEC, *The Legislative History of the 1974 Amendments to the Federal Election Campaign Act* at 1092 (emphasis supplied).

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1. It is clear from the context of Senator Cannon's remarks, his declaration that the States make the determination whether public employees may participate in Federal election, and the Conference Report, that this statement should read "not preempted or superseded".

As the Eighth Circuit noted in *Reeder*, this legislative history "leaves little room for doubt" that the Federal Election Campaign Act did not and was not intended to preempt State laws such as Mo. Rev. Stat. § 84.830. Therefore, petitioner's preemption argument presents no "special and important reasons" for granting certiorari.

CONCLUSION

The issues presented by petitioner's First Amendment and Equal Protection arguments have previously been decided by this Court. The issue presented by petitioner's preemption argument is resolved by the legislative history of the Federal Election Campaign Act. Thus, there are no "special and important reasons" for the Court to exercise its discretion to review the decision of the Supreme Court of Missouri on writ of certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83-1353, 83-1849

Mark Reeder,
Appellee,

v.

Kansas City Board of Police Commissioners, Norman A. Caron, Edward S. Biggar, Gwendolyn M. Wells, Beverly Parks Barker, Richard L. Berkley, and William Birt,
Appellants.

On Appeal from the United States District Court
for the Western District of Missouri.

Submitted: January 9, 1984
Filed: May 3, 1984

Before ROSS and ARNOLD, Circuit Judges, and HARRIS,* Senior District Judge.

ARNOLD, Circuit Judge.

The law of Missouri, Mo. Rev. Stat. §84.830(1), forbids officers or employees of the Kansas City Police

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*The Hon. Oren Harris, Senior United States District Judge for the Eastern and Western Districts of Arkansas, sitting by designation.

Department to make any political contribution.[1] Mark Reeder, a Kansas City Police Sergeant, gave $500.00 to the campaign of John Carnes, a candidate for the Democratic nomination for Representative in Congress from Missouri's Fifth District. As a result, he was dismissed from the police force. In a suit filed by Reeder, the District Court held the state statute invalid on two grounds: that it was preempted by Section 301 of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1289, 2 U.S.C. §453, and that it abridged Reeder's freedom of speech in violation of that portion of the Fourteenth Amendment that applies the First Amendment to the states. We reverse on both these points, but remand for further proceedings on Reeder's claim that the statute deprives him of the equal protection of the laws because it applies to Kansas City police officers but no others in Missouri.

I.

After the oral argument in this Court, the Supreme Court of Missouri decided *Pollard v. Board of Police Comm'rs*, No. 64637 (Mo. Feb. 15, 1984) (en banc). *Pollard* holds that Section 84.830 is neither preempted nor inconsistent with the First Amendment as construed

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1. Mo. Rev. Stat. §84.830, Police department—prohibited activities—penalties (Kansas City), provides in relevant part:

> No officer or employee in the service of said police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatever.

Section 84.830(1) applies to Missouri cities with 300,000 to 700,000 inhabitants, Mo. Rev. Stat. §84.350, but is specifically classified under the heading "PROVISIONS APPLICABLE TO KANSAS CITY." Only Kansas City falls in the specified population range.

by the Supreme Court of the United States. We are of course not bound by holdings of the Supreme Court of Missouri, just as it is not bound by our holdings. The filing of the *Pollard* opinion leaves our obligation to consider the issues on this appeal undiminished. We nevertheless find Judge Blackmar's opinion for the Supreme Court of Missouri thorough and persuasive. We agree with it both as to preemption and the First Amendment, and there is no point in repeating an analysis already so well set out. We add a brief discussion to address some points particularly urged in Reeder's brief.

A.

Title 2 U.S.C. §453 provides:

> The provisions of this Act [the Federal Election Campaign Act of 1971, as amended], and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

Certainly a law prohibiting certain people from contributing to campaigns for federal office can be considered a "law with respect to election to Federal office." But that is not the end of the matter. The statute can also be read to refer primarily to the behavior of candidates - including, for example, the filing of reports disclosing the names and occupations of campaign contributors - and to supersede state laws on permissible contributions only to the extent that federal law expressly forbids certain kinds of contributions - those, for example, made by unions, corporations, or foreign nationals. Even Reeder seems to concede that some state laws that could be characterized as coming within the preemption provision, if read literally and broadly, remain valid. See Brief

for Appellee 11 (States retain the right to prohibit false registration, voting fraud, and theft of ballots, even with respect to federal elections). The preemption statute, then, is not so clear (if any statute ever is) as to preclude us from consulting the legislative history.

The conference report on the bill that became the 1974 amendment leaves little room for doubt on this question. The report says:

> It is the intent of the conferees that any State law regulating the political activities of State and local officers and employees is not preempted or superseded by the amendments to title 5, United States Code, made by this legislation.

S. Conf. Rep. No. 93-1237, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 5618, 5669. Furthermore, right before the conference report was agreed to by the Senate, a colloquy took place between Senator Stevens and Senator Cannon that covers this very point. Senator Cannon was Chairman of the Committee on Rules and Administration, from which the bill was reported, senior conferee on the part of the Senate, and manager of the bill on the Senate floor, so his remarks must be given special weight in determining what Congress meant to say. Mr. Cannon stated that "any State law regulating the political activity of State or local officers or employees is not preempted [or] . . . superseded." 120 Cong. Rec. 34386 (Oct. 8, 1974). "It [would be] . . . up to the State to determine the extent to which they may participate in Federal elections[.]" *Ibid.* (remarks of Senator Stevens).

Sergeant Reeder seeks to avoid the force of this passage by emphasizing the word "activity." It was only active campaigning, such as speechmaking or service

on a campaign committee, that was to be left to State regulation, he says. Contributions by state employees were to be governed entirely by federal law, and since no federal law prohibits such contributions, they cannot be forbidden by a State, either. The argument is that "activity" is a term of art, intended to include only those political activities that had previously been prohibited by federal law if engaged in by state employees whose jobs or programs received federal funds. Our attention is called to the Supreme Court's opinion in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), in which, in two footnotes, *id.* at 572-74 n.18, 576-78 n.21, certain activities forbidden by regulation are listed. It is said that this list of prohibited activities did not include contributions. Therefore, we are told, Senators Cannon and Stevens, when using the term "activity," could not have intended to include contributions.

We are not persuaded by this line of argument. In the first place, the single word "activity" is too weak a reed to bear the weight plaintiff asks us to load upon it. We readily acknowledge that the two Senators involved were well versed in their field. But to attribute to them detailed knowledge of two footnotes in a Supreme Court opinion decided the previous year, an opinion their colloquy does not even mention, and to infer from that an intention to distinguish between contributions and other types of political "activity," is fanciful. In addition, the two footnotes relied on are not so clear as plaintiff makes out. In general, the Civil Service Commission rules set out in note 18 did allow "[v]oluntary contributions to campaign committees and organizations." 413 U.S. at 574 n.18. But they also provided: "Contributions by persons receiving remuneration from funds ap-

propriated for relief purposes are not permitted." *Ibid.* And the rules quoted in note 21, while allowing political contributions in general terms, also authorized agency heads to prohibit any "activity permitted by paragraph (a) of this section,[2] if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests." 413 U.S. at 577 n.21.

The attempted distinction between "activities" and contributions is too artificial to carry the day here. When the Senators used the word "activity," there was, we think, no reason to suppose that they harbored an unspoken intention to exclude from that category political contributions by State employees. They intended instead to leave the States free, so far as any claim of preemption was concerned, to allow or forbid political activities, including contributions, by their own employees.

B.

In support of his argument that the statute violates the First Amendment, Reeder stresses that the campaign to which he contributed was a campaign for federal office, that the candidate he supported was actually a member of the City Council of Independence, Missouri, not of Kansas City, and that a member of Congress has no power to influence for good or ill the career of a city police officer. We are not persuaded that these considerations diminish the state's interest enough to require a decision in favor of the plaintiff. Politics, like law, is in many respects a seamless web. Candidates for public office often make, or appear to make, alliances

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2. Contributions were permitted by paragraph (a)(8) of the section referred to. The regulations quoted by the Supreme Court thus used the term "activity" to include contributions.

among themselves. "The legislature would have good reason to think that a prohibition which did not extend to federal candidates and federal elections would be futile. The major parties operate on a national basis and function in federal, state and local contests. . . . A contribution to a congressional candidate well might benefit the local politicians who have made common cause with that candidate." *Pollard v. Board of Police Comm'rs, supra,* slip op. 13. Certainly the dangers posed by a direct contribution to a candidate for Mayor or Governor are more obvious, since the Mayor is a member of the Kansas City Board of Police Commissioners, and the Governor appoints the remaining members. But the difference between this kind of contribution and a contribution like the one Reeder made here is not sufficiently pronounced to require a holding that the latter may not be validly prohibited, even if the former may.

The fact is that public employees are subject to more severe restrictions than the public at large. No one would contend, for example, that Congress or a state legislature could forbid a member of the public from becoming a candidate for the state Senate. Yet, precisely that prohibition has been upheld by this Court as applied to an officer of the St. Louis Police Department. *Otten v. Schicker,* 655 F.2d 142 (8th Cir. 1981). People who become public employees receive certain benefits and undertake certain duties. One of those duties may require the surrender of rights that would otherwise be beyond the reach of governmental power. This is especially true in the case of the police, whose duty it is to keep the peace by force of arms if necessary. "A state may demand of its police officers a more exacting standard of conduct than it could validly impose by criminal statute on citizens in general." *Vorbeck v. Schicker,* 660 F.2d 1260, 1267 (8th Cir. 1981) (Arnold, J., con-

curring), *cert. denied,* 455 U.S. 921 (1982). It is proper for a state to insist that the police be, and appear to be, above reproach, like Caesar's wife.

It is undeniable that this kind of restriction does abridge the freedom of speech in a literal sense. But the Supreme Court has often stated that First Amendment rights, despite their preferred position in our constitutional scheme, are not absolute. They must yield on occasion to the demands of public safety. The Supreme Court has clearly stated that government may impose on its own employees rather substantial restrictions on political activity that is open without question to the citizenry at large. See *Broadrick v. Oklahoma,* 413 U.S. 601 (1973); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548 (1973); *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). The same power that may prevent a public employee from making a political speech or conducting a political meeting (even on the employee's own time) may also forbid campaign contributions. Plaintiff cites *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam), and *Elrod v. Burns,* 427 U.S. 347 (1976), in an effort to persuade us that the holdings in *Mitchell, Letter Carriers,* and *Broadrick* are out of date, but we are not convinced. *Buckley* does say that contributing to campaigns is an activity protected by the First Amendment, but *Buckley* involved a statute applicable to the public at large, not just to public employees. *Elrod* was a public-employee case, but it stands only for the proposition that a public official may not summarily dismiss his subordinates because of their ideology or political association. The interest there weighed against First Amendment rights was not really an interest of the state as a whole at all, but rather an individual interest of the newly elected official who wished to purge the ranks of his employees.

The Supreme Court has never spoken directly on the subject of political contributions by police officers or other public employees, but we find in *Kelley v. Johnson*, 425 U.S. 238 (1976), an implication that restraints on campaign contributions would not be treated differently from other kinds of prohibitions against political activity that have been upheld. In *Kelley* the Court upheld a regulation of the Police Department of Suffolk County, New York, imposing certain limits on the length of police officers' hair. In the course of its opinion, after remarking that "we have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment," *id.* at 245, the Court set forth the following description of various restrictions imposed on police officers of Suffolk County by their employer:

> The hair-length regulation here touches respondent as an employee of the county and, more particularly, as a policeman. Respondent's employer has, in accordance with its well-established duty to keep the peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large. Respondent must wear a standard uniform, specific in each detail. When in uniform, he must salute the flag. He may not take an active role in local political affairs by way of being a party delegate or *contributing* or soliciting political contributions. He may not smoke in public. All of these and other regulations of the Suffolk County Police Department infringe on respondent's freedom of choice in personal matters. . . .

Id. at 245-46 (emphasis ours). We do not pretend to find in this passage a holding that a prohibition against contributions is valid. That question was not presented

in *Kelley*. There is, however, a fairly clear implication in the opinion that the six Members of the Court who joined it believed that a restriction on contributions would be upheld. There is no other good explanation for the Court's decision to list contributions in its opinion among those activities that the employees of the police department before it were not allowed to engage in.

In short, though the State of Missouri could certainly have made a different choice, the Supreme Court's cases compel the conclusion that the choice made here does not exceed the state's constitutional power under the First Amendment.

II.

Plaintiff also argues that §84.830(1) violates the Equal Protection Clause of the Fourteenth Amendment. The statute applies to police officers in Kansas City only. No state statute forbids political contributions by other police officers, either state or local. In fact, Rule 7.012 (a)(1)(h) of the St. Louis Police Department specifically permits police officers in that city to "make a financial contribution to a political party or organization." The District Court did not reach this question, having already held the statute invalid on other grounds.

We have power to affirm the judgment below on any ground supported by the record, whether or not raised or relied on in the District Court. See, *e.g.*, *Brown v. St Louis Police Department*, 692 F.2d 61 (8th Cir. 1982). This power should normally be exercised only where the issue is one of law, no factual questions are outstanding that might affect its resolution, and there is no reason to believe that we would benefit from giving the opportunity to the District Court to address

the question in the first instance. We believe this case is an appropriate one for a remand on the equal-protection issue. The District Court never addressed it, and the record before us is not really adequate to enable us to address it. The information cited above about the regulations of the St. Louis Police Department was supplied to us by stipulation after oral argument. We have no definite information about the rules or regulations of other police departments in Missouri. In addition, we think the defendants ought to be allowed a chance to offer evidence to justify the seeming disparity between Kansas City and other police departments in the state.

The Supreme Court of Missouri, *Pollard v. Board of Police Comm'rs, supra,* slip op. 17, rejected the equal-protection argument rather summarily, citing only our opinion in *Otten v. Schicker, supra.* But *Otten* involved an alleged discrimination between police officers on the one hand and other public employees on the other. That kind of distinction is easier to draw and to justify than a distinction between police officers in one city and police officers in another. In addition, this kind of classification, affecting as it does First Amendment rights, may require more than simply a rational basis to withstand constitutional attack. In short, the issue should be developed further on remand.

The judgment is reversed, and the cause remanded for further proceedings on the equal-protection claim in accordance with this opinion.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 83-2076

In the Supreme Court of the United States

October Term, 1983

ROGER POLLARD,
Petitioner,

vs.

BOARD OF POLICE COMMISSIONERS AND
NORMAN A. CARON,
Respondents.

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

REASONS FOR GRANTING THE WRIT

I. R.S.Mo. § 84.830 (1978) Impermissibly Infringes on Petitioner's Rights Under the First Amendment.

In Respondents' Brief in Opposition to Petition for Writ of Certiorari they argue that the public interest in eliminating corruption outweighs Petitioner's interests in freedom of speech and association.

Respondents are guilty of the same sort of faulty analysis eschewed by this Court in *United States v. Robel*, 389 U.S. 258 (1967). In that case the government argued that its interest in the national security should be balanced against Robel's interest in freedom of association. In response to that proposed analytical framework Chief Justice Warren noted as follows:

> It has been suggested that this case should be decided by "balancing" the governmental interests expressed in § 5(a)(1)(D) [of the Subversive Activities Control Act] against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. *Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal.* In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.

389 U.S., at 268 n.20.

The same thing is true at bar. The essential issue in this case is *not* whether Missouri has a more important interest in preventing police politicization than has Petitioner in exercising his First Amendment rights. Rather, the issue is whether Missouri has adopted a constitutional means in achieving its concededly legitimate legislative goal. Significantly, Respondents make no attempt in their Brief to meet their burden to show that Missouri's interests could not be met by restrictions that are less intrusive on Petitioner's First Amendment rights, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74 (1981).

Respondents claim that this Court has previously decided that voluntary political contributions by governmental employees may be prohibited, citing *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1946); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). This argument is simply wrong. The statutes involved in those cases did not prohibit voluntary contributions. Indeed, the regulations promulgated under the Hatch Act (the subject of *Mitchell* and *Letter Carriers*) expressly permit such contributions, 413 U.S., at 576 n.21.

Finally, Respondents emphasize that this contribution was a "public, partisan, political contribution," Respondents' Brief at 10, emphasizing that the fact of the contribution was published in the Kansas City *Star*. Respondents imply that Petitioner was attempting to gain publicity by making his "public" contribution.

The Kansas City *Star* article to which Respondents refer published the names of *all* contributors to candidates running for the Fifth District nomination. This article

listed the names of 364 contributors in very small print. Petitioner's name was not singled out for special attention, nor did Petitioner seek such attention. The only reason that the fact of this contribution ever became public knowledge was because the names of all contributors are a matter of public record under Missouri law, R.S.Mo. § 130.086 (1978), a circumstance beyond Petitioner's control.

One other thing should be noted about Petitioner's First Amendment argument. Respondents rely on the case of *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543 (8th Cir. 1984), in their Brief. The Eighth Circuit's opinion is quite similar to that of the Missouri Supreme Court. The Eighth Circuit does raise one new point that should be addressed, however.

The Eighth Circuit cited this Court's Opinion in *Kelley v. Johnson*, 425 U.S. 238 (1976), for the proposition that this Court impliedly gave its imprimatur to a ban on voluntary political contributions by police officers, 733 F.2d, at 548.

The simple answer to the Eighth Circuit's reasoning is that *Kelley* is completely inapposite. *Kelley* involved a challenge to police hair length regulations. Those regulations were *not* challenged on First Amendment grounds, 425 U.S., at 251 n.3, nor was a First Amendment standard of review employed, *Division 241 Amalgamated Transit Union (AFL-CIO) v. Susey*, 538 F.2d 1264, 1266 (7th Cir. 1976). Hence, *Kelley* does not decide the case at bar.

Because the present case presents a profound limitation on fundamental rights never before directly addressed by this Court, certiorari should be granted.

II. R.S.Mo. § 84.830 (1978) Violates the Equal Protection Clause of the Fourteenth Amendment.

Respondents claim that under *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), Missouri may deny *Kansas City* police officers the right to make voluntary political contributions while not denying such rights to other police officers in the State. *Broadrick* holds no such thing.

Plaintiffs in *Broadrick* were classified employees of the State of Oklahoma. They argued that Oklahoma law restricting their rights to engage in partisan political activities violated the equal protection clause of the Fourteenth Amendment because the law imposed no such restrictions on unclassified employees. There was no indication that these two classes of employees occupied similar positions.

In contrast § 84.830 singles out certain members of a particular class—*viz.* Kansas City police offcers—and denies them rights afforded to other members of the same class—i.e. all other police officers in the State of Missouri. Respondents provide absolutely no rationale for limiting the effect of § 84.830 to Kansas City police officers.

Section 84.830 presents a classic example of a statutory classification that burdens the exercise of fundamental rights by a particular group—Kansas City police officers. In order to satisfy the Fourteenth Amendment, the discriminatory treatment of Kansas City police officers must be necessary to achieve a compelling State interest, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 34 n.73 (1973). It is of overwhelming significance that Respondents make no attempt to demonstrate why Kansas City police officers should be denied rights that are not denied to, say, St. Louis police officers.

Respondents' inability to offer any cogent reasons to support the discriminatory treatment of § 84.830 warrants the grant of certiorari.

III. Application of R.S.Mo. § 84.830 (1978) At Bar Is Preempted by the Federal Election Campaign Act, 2 U.S.C. § 453.

Respondents go on at length about the legislative history of the 1974 amendments to the Federal Election Campaign Act, claiming that Congress did not intend to preempt laws like § 84.830. Respondents rely on the same legislative history cited by the Missouri Supreme Court.

In his Petition for Writ of Certiorari Petitioner demonstrated that the legislative history set out by the Missouri Supreme Court was applicable to 5 U.S.C. § 1502 rather than 2 U.S.C. § 453. He argued that Congress' intent as to the preemptive effect of 2 U.S.C. § 453 could not be ascertained by looking to the legislative history of an entirely different section.

In their Brief Respondents simply ignore Petitioner's argument. Respondents never explain how the intent of Congress in enacting an amendment to 5 U.S.C. § 1502 has anything to do with its intent in enacting 2 U.S.C. § 453.[1]

The preemptive effect of 2 U.S.C. § 453 on the power of the States to restrict contributions to candidates for federal office warrants the grant of certiorari.

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1. It should be emphasized that the present case does not involve 5 U.S.C. § 1502. Petitioner is not a State or local employee whose position is funded by federal grant.

CONCLUSION

For the above reasons Petitioner would pray this Court to grant his Petition.

Respectfully submitted,

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(3)

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROGER POLLARD, PETITIONER

v.

BOARD OF POLICE COMMISSIONERS AND
NORMAN A. CARON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Federal Election Campaign Act preempts a Missouri statute that prohibits Kansas City police officers from making contributions for "the promotion of * * * any political purpose whatever," insofar as that statute prohibits contributions to candidates for federal office.

2. Whether the Missouri statute violates the First Amendment.

3. Whether the Missouri statute violates the Equal Protection Clause of the Fourteenth Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner was a sergeant in the Kansas City, Missouri, Police Department. In July 1982, he contributed $1,000 out of his own funds to a political committee formed to promote the candidacy of an individual seeking the Democratic nomination for United States Representative from the Fifth District of Missouri. Petitioner's contribution was not solicited by or paid to a member of the Police Department and was not made on public premises or while petitioner was in uniform. Pet. App. A25, A27.

As a result of petitioner's contribution, and after a hearing, respondents — the Chief of Police and Board of Police Commissioners of Kansas City — terminated petitioner's

employment as a police officer. They relied on Mo. Ann. Stat. § 84.830 (Vernon 1971), which prohibits any political contributions by Kansas City police officers.[1] Petitioner then filed suit in the Circuit Court of Jackson County, Missouri, seeking reinstatement. Petitioner alleged that Section 84.830, insofar as it applied to federal elections, was preempted by the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and that the enforcement of Section 84.830 against him violated both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The Circuit Court ruled in petitioner's favor and ordered him reinstated with back pay (Pet. App. A25-A40); the court upheld petitioner's preemption (*id.* at A30-A35) and First Amendment (*id.* at A35-A40) claims and did not reach his equal protection argument.

A divided Missouri Supreme Court reversed (Pet. App. A1-A18). It rejected petitioner's preemption claim on the ground that the FECA preempts only "the limited field of statutes imposing restrictions on candidates for federal office and their campaign committees" (*id.* at A6). The court also rejected petitioner's First Amendment claim on the ground that "the interest of the state in protecting a metropolitan police department from political domination

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[1]Mo. Ann. Stat. § 84.830 (Vernon 1971) provides:

> 1. * * * No officer or employee in the service of [the Kansas City] police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatever.
>
> * * * * *
>
> 7. Any officer or any employee of the police department of such cities who shall be found by the board to have violated any of the provisions of this section shall be discharged forthwith from said service. * * *

and influence is substantial, significant, important and compelling" (*id.* at A17). The court dismissed petitioner's equal protection claim as "lacking in merit" (*ibid.*).

Judges Welliver and Donnelly dissented. Judge Welliver stated that it was "questionable" whether the FECA preempts Section 84.830, but he rested his dissent on the ground that Section 84.830, while perhaps constitutional as applied to contributions to candidates for state and local office, violates the First Amendment as applied to federal elections (Pet. App. A18-A20). Judge Donnelly urged that Section 84.830 is preempted by the plain language of the FECA (Pet. App. A21-A22). He also stated that the First Amendment precludes the application of Section 84.830 to federal elections (Pet. App. A22-A24).

DISCUSSION

1. a. In our view, the Missouri Supreme Court erred in concluding that Section 84.830 is not preempted by the FECA. The FECA contains detailed and comprehensive limits on the amounts and sources of contributions to federal election campaigns, including the campaign of a person seeking a nomination to run for Congress (see 2 U.S.C. 431(1), (2), and (3)). Specifically, the FECA provides that "[n]o person shall make contributions * * * to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000" (2 U.S.C. 441a(a)(1)(A)). The FECA further prohibits corporations, labor organizations, foreign nationals, and government contractors from making any contributions to candidates for federal office (2 U.S.C. 441b, 441c, 441e). The FECA also regulates in detail the aggregate contributions that may be made by individuals to candidates and political committees (see 2 U.S.C. 441a(a)), the establishment of segregated funds for political purposes (commonly known as political action committees) by

corporations and labor unions (see 2 U.S.C. 441b(b)), and similar matters relating to the sources of funds for federal elections. Petitioner's contribution — a contribution by an individual of $1,000 — complied with these federal statutory provisions.

These restrictions on the sources and amounts of campaign contributions were, for the most part, enacted as part of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 *et seq.*, which have been described as " 'by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress.' " *Buckley* v. *Valeo,* 424 U.S. 1, 7 (1976), quoting *Buckley* v. *Valeo,* 519 F.2d 821, 831 (D.C. Cir. 1975). When Congress enacted the 1974 Amendments, it included two broad preemption clauses. 2 U.S.C. 453 provides:

> The provisions of [the FECA], and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

The House committee that drafted this clause explained its intent in sweeping terms (H.R. Rep. 93-1239, 93d Cong., 2d Sess. 10 (1974)):

> It is the intent of the Committee to preempt all state and local laws.
>
> * * * It is the intent of the committee to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated. * * * The committee also feels that there can be no question with respect to preemption of local laws. Since the committee has provided that the Federal law supersede[s] and preempt[s] any law enacted by a State, the Federal law

> will also supersede and preempt any law enacted by a political subdivision of a State.

The 1974 Amendments placed the principal restrictions on campaign contributions and expenditures in Title 18, the Criminal Code. See 18 U.S.C. (Supp. IV 1974) 608 *et seq.* The second preemption clause included in the 1974 Amendments was specifically applicable to these restrictions (Pub. L. No. 93-443, § 104(a), 88 Stat. 1272 (codified at 18 U.S.C. 591 note)):

> The provisions of chapter 29 of title 18, United States Code, relating to elections and political activities, supersede and preempt any provision of State law with respect to election to Federal office.

The House committee explained this preemption provision as follows (H.R. Rep. 93-1239, *supra,* at 10-11):

> [This] preemption provision was added * * * to make it clear that the Federal law is intended to be the sole source of criminal sanctions for offenses involving political activities in connection with Federal elections. The committee wants to avoid even the possibility of an argument that the preemption provision contained in [2 U.S.C. 453] referring to "provisions of this Act" [2] does not include the provisions of title 18 amended by * * * this legislation. This clarification is most important because all of the actual limitations on contributions and expenditures, together with the sanctions for violation of such limitations, are included

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[2]The report actually refers to "the preemption provision contained in the 1971 Act referring to 'provisions of this Act'* * *." Both the context and the fact that the quoted language does not appear in the preemption provision of the unamended 1971 Act (see 2 U.S.C. (Supp. II 1972) 453, quoted at page 15 note 7, *infra*), make it apparent that the committee was referring to its proposed amendment to the 1971 Act — the language that subsequently was enacted as 2 U.S.C. 453.

in the criminal code provisions of title 18 amended by this legislation.

The conference committee report on the 1974 Amendments then explained the precise extent to which Congress intended the statute it was amending to preempt state law (H.R. Rep. 93-1438, 93d Cong., 2d Sess. 69 (1974) (emphasis added)):

> The provisions of [the 1974 Amendments] make it clear that the Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, *the sources of campaign funds used in Federal races,* the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights to prohibit false registration, voting fraud, theft of ballots, and similar offenses under State law.[3]

b. The plain language and legislative history of the 1974 Amendments demonstrate that Mo. Ann. Stat. § 84.830, insofar as it applies to federal election campaigns, is preempted by federal law. Section 84.830 regulates the contributions that may be made to federal campaigns; in the words of the conference report, it "relat[es] to limitations on * * * the sources of campaign funds used in Federal races." Congress not only legislated comprehensively in this area; it explicitly stated its intention to occupy this field in strong and unequivocal terms. Indeed, Congress enacted a second, arguably redundant preemption clause for the express purpose of precluding "even the possibility of an

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[3]This passage from the conference report was addressed to the preemption provision that Congress added for the purpose of establishing that the limitations on contributions contained in the 1974 Amendments occupied the field. The passage from the conference report quoted by the court below (see Pet. App. A7) addressed the other preemption clause and accordingly made no mention of limitations on contributions or on the sources of funding.

argument" (H.R. Rep. 93-1239, *supra,* at 10-11) that state law might supplement the limitations on contributions and expenditures in connection with federal campaigns that were included in the 1974 Amendments.

In addition, the Federal Election Commission, the expert administrative body established by Congress to implement the 1974 Amendments (see, *e.g.,* 2 U.S.C. 437c(b), 437d(e), 437f; *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 37 (1981)) has issued a regulation providing that "Federal law supersedes State law concerning the * * * [l]imitation on contributions and expenditures regarding Federal candidates and political committees." 11 C.F.R. 108.7(b)(3). In response to the Solicitor General's inquiry concerning the FEC's views on the preemption question in this case, the FEC, on January 23, 1985, concluded by a vote of 6-0 that the FECA preempts Mo. Ann. Stat. § 84.830 to the extent that that statute applies to contributions made to influence an election to federal office. In sum, the plain language of the FECA, emphatic statements in the legislative history, and the considered judgment of the agency charged with enforcing the statute all support the conclusion that Section 84.830 is preempted by federal law.

c. While certain arguments can be advanced in support of the Missouri Supreme Court's contrary conclusion, they are not, in our view, sufficient.

i. First, petitioner was not subjected to a criminal sanction; the committee reports we quoted above stated that "Federal law is intended to be the sole source of criminal sanctions" (H.R. Rep. 93-1239, *supra,* at 10) and that "Federal law occupies the field with respect to criminal sanctions relating to * * * the sources of campaign funds used in Federal races" (H.R. Rep. 93-1438, *supra,* at 69). But the language of the preemption provisions of the 1974 Amendments is not limited to state criminal laws: both of those provisions broadly "supersede and preempt *any* provision

of State law with respect to election to Federal office" (emphasis added). Moreover, the FECA provides for an integrated scheme of civil and criminal enforcement (see 2 U.S.C. 437g) that Congress has described as "a delicate balance designed to effectively prevent and redress violations" (H.R. Rep. 94-917, 94th Cong., 2d Sess. 4 (1976)) and has carefully adjusted from time to time. See Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, §§ 107(b), 109, 90 Stat. 482-483; H.R. Rep. 94-917, *supra,* at 3-4; S. Rep. 94-677, 94th Cong., 2d Sess. 7-8 (1976); H.R. Rep. 94-1057, 94th Cong., 2d Sess. 45-50 (1976). Congress conferred on the FEC the power to bring civil actions to enforce the FECA (2 U.S.C. 437d(a)(6)) and explicitly stated that "the power of the Commission to initiate such civil actions * * * shall be the exclusive civil remedy for the enforcement of the provisions of this Act" (2 U.S.C. 437d(e)). In these circumstances, it is most unlikely that Congress intended to preempt only state criminal laws and to allow state regulation so long as the state imposed noncriminal penalties.[4]

ii. The Missouri Supreme Court suggested that Section 84.830 is not preempted by the FECA because its purpose is to eradicate a different evil. The purpose of Section 84.830, the court found, was to remedy a situation in which ostensibly voluntary political contributions were in fact extorted

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[4]Similarly, it is immaterial that the limitations on contributions are no longer contained in Title 18 of the United States Code but have been transferred to Title 2 (see Pub. L. No. 94-283, §§ 112(2), 201(a), 90 Stat. 486, 496). The knowing and willful violation of these restrictions remains a crime (see 2 U.S.C. 437g(d)), and we know of no suggestion in the legislative history of the statute effecting the transfer that Congress intended the transfer to undermine the preemptive effect of these provisions. Indeed, the legislative history of this statute emphasizes the carefully integrated and balanced nature of the enforcement scheme. See, *e.g.,* H.R. Rep. 94-917, *supra,* at 3-4. This is evidence that Congress did not intend that scheme to be supplemented or disrupted by state remedies. See *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218 (1947).

from police officers, and in which the police force was subject to political influence because police officers were chosen for their loyalty to the governing political machine. See Pet. App. A3-A4, A28-A29; see also Br. in Opp. 2-4. By contrast, Congress, in enacting the FECA and its amendments, was concerned not with the possibility of extortion or political influence among those who make political contributions but with the "real or imagined coercive influence of large financial contributions" on the *recipients* of contributions. See *Buckley,* 424 U.S. at 25.

The reasoning of the Missouri Supreme Court that Section 84.830 is not preempted because it is addressed to concerns that are distinctively local and different from those of the federal regulatory scheme might have some force if petitioner's contention were that the FECA *implicitly* preempted Section 84.830. Cf. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 241-244 (1959). But in this case it is unnecessary to determine whether preemption can be inferred from the nature and objectives of the federal regulatory scheme; the FECA explicitly — indeed, emphatically — preempts state regulation in the area of limitations on contributions to federal campaigns. See *Aloha Airlines* v. *Director of Taxation,* No. 82-585 (Nov. 1, 1983), slip op. 4-5 & n.5 (rules for discerning congressional intent developed in cases involving the implicit preemption of state statutes "have little application when a court confronts a federal statute * * * that explicitly preempts state laws"). The broad preemption clauses of the 1974 Amendments, and the language in the conference report expressing an intent to "occup[y] the field with respect to * * * the sources of campaign funds used in Federal races" — especially when combined with the FEC's interpretation of the statute it is charged with administering — leave no room for the contention that the states may

legislate in this area in order to promote distinctively local concerns not addressed by the federal legislation.[5]

In addition, the reasoning of the Missouri Supreme Court appears to have no limiting principle. A state might legitimately assert a special interest in preventing the adverse effects and appearances potentially caused by the political contributions not just of state and local government employees but of other classes of citizens as well — for example, registered lobbyists (see page 15 note 8, *infra*), individuals employed in industries regulated by the state, and professionals, such as lawyers, licensed by the state. Under the reasoning of the Missouri Supreme Court, a state would apparently be able to limit the political contributions of each of these groups. The result would be that, insofar as a substantial proportion of the citizens of such a state were concerned, Congress's deliberate decision to allow federal campaign contributions of up to $1,000 would effectively be nullified. For this reason, the conclusion that Section 84.830 is preempted is supported not just by the language and legislative history of the FECA and the FEC's interpretation but by the need to maintain the integrity of the congressional scheme.

iii. Finally, certain passages in another portion of the legislative history of the Federal Election Campaign Act Amendments of 1974 persuaded the Missouri Supreme Court that Section 84.830 is not preempted. See Pet. App. A7-A10. The Eighth Circuit, in considering a challenge to Section 84.830 brought by another Kansas City police

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[5]Moreover, nothing in the FECA prevents a state from directly attacking the problems with which Section 84.830 is said to be concerned. A state may of course directly outlaw extortion and prohibit the use of political criteria in the selection of police officers. Section 84.830 is preempted solely because it addresses these problems by sweeping means that infringe on an area — the regulation of contributions to federal election campaigns — that Congress has explicitly occupied.

officer who was discharged for contributing to a federal election campaign, was persuaded by the same passages. See *Reeder* v. *Kansas City Board of Police Commissioners,* 733 F.2d 543, 545-546 (1984) (reprinted at Br. in Opp. A1-A11).

At the same time that Congress amended the FECA in 1974, it also amended some of the provisions of the Hatch Act. Before 1974, the Hatch Act, in addition to prohibiting certain political activities by federal employees (see generally *CSC* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973)), also prohibited certain state and local employees whose principal employment was in programs funded by the federal government from "tak[ing] an active part in political management or in political campaigns." 5 U.S.C. (1970 ed.) 1502(a)(3). In 1974, in the same statute in which it amended the FECA, Congress amended this provision of the Hatch Act to specify that such state and local employees were prohibited only from "be[ing] a candidate for elective office." Pub. L. No. 93-443, § 401(a), 88 Stat. 1290; see 5 U.S.C. 1502(a)(3). The House report on this amendment explains it as follows (H.R. Rep. 93-1239, *supra,* at 11):

> The amendment[] * * * would remove from Federal law the prohibition against voluntary partisan political activity by State and local employees employed in programs funded in whole or in part from Federal loans or grants. Activities such as driving voters to the polls or attending a political convention as a delegate would no longer be prohibited by Federal law. The regulation of political activities of State and local employees would be left largely to the States. Federal law would, however, continue to prohibit a State or local officer or employee from using his official authority or influence to interfere with or affect the result of

an election and prohibit him from coercing, commanding, or advising another State or local officer or employee to pay, lend, or contribute anything of value to any person for political purposes. Nothing in existing law or in the amendment made by this section prevents a State or local officer or employee from making a voluntary political contribution.

The conference report, on which the court below relied (Pet. App. A9), contains the following explanation (H.R. Rep. 93-1438, *supra,* at 102 (emphasis added)):

> It is the intent of the conferees that any State law regulating the political activities of State and local officers and employees is not preempted or superseded *by the amendments to title 5, United States Code, made by this legislation.*

When the conference report was submitted to the Senate, Senators Stevens and Cannon engaged in the following colloquy, which was quoted at length and heavily relied on by the court below (see Pet. App. A8-A9; 120 Cong. Rec. 34386 (1974)):

> Mr. STEVENS. Mr. President, just 1 minute. I should like to clarify something, if I may, with the manager of the bill.
>
> A provision of this bill amends section 1502 of title 5 relating to the activity of State or local employees in Federal campaigns. Specifically, it takes out subsection (a)(3), which prohibits a State or local officer or employee from taking an active part in political management or political campaigns, and substitutes for that a prohibition from being a candidate for Federal office.
>
> It is my understanding, and I should like to ask the manager of the bill, my friend from Nevada (Mr. CANNON), if he agrees that this means that State laws

which prohibit a State employee, or local laws which prohibit a local employee, from engaging in Federal campaign activities and Federal campaigns, are still valid?

* * * * *

I think it is quite important, because many of our States have the so-called little Hatch Act, and it was not our intent to repeal those "little Hatch Acts," or to modify them, but to take it out of the Federal law so that Federal law does not prohibit those activities, leaving it up to the State to do so.

Mr. CANNON. The Senator is absolutely correct.
* * *

* * * It was the intent of the conferees that any State law regulating the political activity of State or local officers or employees is not preempted [or] superseded. We did want to make it clear that if a State has not prohibited those kinds of activities, it would be permissible in Federal elections.

This would get away from the situation in which the Federal Government gives the State funds toward many different programs, and some of those employees have been fearful that they could not participate in Federal campaigns. This would eliminate that problem.

Mr. STEVENS. It is up to the State to determine the extent to which they may participate in the Federal elections?

Mr. CANNON. The Senator is right. The States make that determination.

All of this legislative history, however, was explicitly intended by the committees and Senator Stevens to illuminate the meaning of the 1974 Amendments to the Hatch

Act — not to narrow the preemption clauses of the amendments to the FECA. The statement of the conference committee, Senator Stevens's inquiry, and Senator Cannon's reference to "the situation in which the Federal Government gives the State funds" were by their terms confined to the Hatch Act amendments; they made no reference to any other provision, and there is no evidence that either the conference committee or Senators Stevens and Cannon believed that they were explaining the meaning of the preemption provisions of the quite distinct FECA amendments that happened to be included in the same statute.

In addition, it seems clear that the political "activities" to which Senator Stevens and the committee report referred when they emphasized that states could continue to regulate their employees' political activities do not include voluntary campaign contributions. Such contributions have never been a subject regulated by the Hatch Act; the Hatch Act has not been construed to prohibit the making of such contributions. See *Letter Carriers,* 413 U.S. at 577 n.11; 5 C.F.R. 733.111(a)(8).[6] Indeed, the House committee report that we quoted above stated that "[n]othing in existing law or in the amendment [to the Hatch Act] made by this section prevents a State or local officer or employee from making a voluntary political contribution." This statement reveals that Congress did not consider the making of voluntary campaign contributions to be among the forms of political activity regulated by the Hatch Act; rather, Congress apparently viewed that as a subject regulated by the FECA.[7]

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[6]In this case, the trial court stated that it had reviewed the "little Hatch Acts" of all the states and that, apart from Section 84.830, only the laws of Louisiana prohibit voluntary campaign contributions. Pet. App. A33-A34.

[7]Prior to the 1974 Amendments, the preemption clause of the FECA was as follows (2 U.S.C. (Supp. II 1972) 453):

2. While it seems reasonably clear that the Missouri Supreme Court's decision is in error, it is less clear whether the decision warrants this Court's review. We are aware of no evidence suggesting that restrictions comparable to Section 84.830 are common.[8] The trial court in this case stated that it had "reviewed the little Hatch Acts of the fifty states"

(a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any State law, except where compliance with such provision of law would result in a violation of a provision of this Act.

(b) Notwithstanding subsection (a) of this section, no provision of State Law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure * * * which he could lawfully make under this Act.

It might be argued that if Congress intended the 1974 Amendments to preempt state statutes like Section 84.830, it would have continued in effect the language of subsection (b) and expressly provided that no state law shall prohibit any person from making any contribution he could lawfully make under the FECA.

In view of the sweeping preemption clauses that Congress *did* enact in 1974, however, its failure to use language that would deal precisely with measures like Section 84.830 is of little significance. The legislative history of the preemption provisions of the 1974 Amendments precludes any suggestion that Congress meant to expand the permissible scope of state regulation. Congress manifestly had precisely the opposite intent. Congress evidently believed that the broad preemption clauses of the 1974 Amendments would subsume the much narrower preemption provision of the unamended 1971 Act. (We note in addition that when Congress enacted 2 U.S.C. (Supp. II 1972) 453(b), it apparently was concerned with expenditures by and on behalf of candidates, not by individuals expressing their support for candidates. See 117 Cong. Rec. 43396-43397 (1971).)

[8]The FEC has been empowered to issue advisory opinions on the request of office holders, candidates, and political committees since 1974 (see 2 U.S.C. (Supp. IV 1974) 437f) and, since 1980, in response to any proper request (see 2 U.S.C. 437f). The FEC has issued only one advisory opinion dealing with a question similar to that presented by this case. See AO 1978-66 (expressing the view that the FECA preempts a California statute that forbids candidates from accepting contributions from registered lobbyists).

(Pet. App. A33) and that except for the Louisiana law (see *Bruno* v. *Garsaud*, 594 F.2d 1062 (5th Cir. 1969)), and Section 84.830 (which applies only to the Kansas City Police Department) none of these statutes prohibits voluntary campaign contributions. Furthermore, there is no conflict in the circuits on the question whether a state may prohibit its employees, or a certain category of employees, from making contributions to a federal election campaign.

On the other hand, this may be an area in which there is a particular need for the Court to clarify the law at a relatively early stage. Prohibitions on contributions to federal campaigns by state or local employees — or by other individuals or entities that the state may assert a special interest in regulating (see page 10, *supra*) — might be found not only in the state statutes reviewed by the trial court in this case but in municipal ordinances and administrative directives. See, *e.g.*, *Mancuso* v. *Taft*, 476 F.2d 187, 189 n.1 (1st Cir. 1973); *Hobbs* v. *Thompson*, 448 F.2d 456, 457 (5th Cir. 1971). An individual subject to such a prohibition would be faced with sharply divergent assessments of its legality from authoritative bodies — the Missouri Supreme Court and the Eighth Circuit have held such a restriction lawful, but the FEC has taken the position that such a prohibition is preempted by the FECA. See also pages 16-17 note 9, *infra*. Limitations on campaign contributions implicate the First Amendment right to freedom of speech (see *Buckley*, 424 U.S. at 12-38), and in this sensitive area there is much to be said for not leaving individuals in a state of such uncertainty.[9] It would

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[9]Petitioner contends (Pet. 5-15) that Section 84.830, at least as applied to contributions to federal election campaigns, violates the First Amendment and the Equal Protection Clause. (Both dissenting judges below noted that the resolution of the First Amendment issue raised by petitioner might differ depending on whether Section 84.830 was applied to federal elections or only to state and local elections. See Pet. App. A20, A24.) Because, as we have explained, Congress has occupied

therefore not be inappropriate for the Court to grant review in this case.[10]

Respectfully submitted.

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the field of regulating the permissible sources of contributions to federal campaigns and has not seen fit to enact a total prohibition on campaign contributions comparable to Section 84.830, there is no need for the Court to address these constitutional issues in this case.

While there is no clear conflict in the circuits on the First Amendment issue raised by petitioners, dictum in the Fifth Circuit's decision in *Bruno* v. *Garsaud, supra,* is inconsistent with both the decision below and the Eighth Circuit's decision in *Reeder* v. *Kansas City Board of Police Commissioners, supra.* In *Bruno,* the Fifth Circuit, in considering the provisions of Louisiana law that prohibit political contributions by state employees, stated that it had "strong doubts that [that prohibition] could constitutionally be enforced to prohibit Louisiana classified employees, at least when acting as private citizens without any fanfare or publicity, from making contributions to a political candidate or party. * * * Insofar as the statute does purport to proscribe altogether this constitutionally protected conduct, it sweeps too broadly." 594 F.2d at 1064. See also *Wachsman* v. *City of Dallas,* 704 F.2d 160, 174 (5th Cir.), cert. denied, 464 U.S. 1012 (1983).

[10]We note that an appeal of the judgment of the Missouri Supreme Court apparently would have been within this Court's mandatory jurisdiction. 28 U.S.C. 1257(2).